

No. _____

In The
Supreme Court of the United States

—◆—

LIBERTARIAN PARTY OF OHIO, *et al.*,

Petitioners,

v.

JON HUSTED, Ohio Secretary of State, *et al.*,

Respondents.

—◆—

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

—◆—

PETITION FOR A WRIT OF CERTIORARI

—◆—

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QUESTIONS PRESENTED

1. Whether a State's officially recognizing voters as members of established political parties while denying this same benefit to new political parties places a severe and unconstitutional burden on the new parties' and their supporters' First and Fourteenth Amendment rights.
2. Whether a major political party engages in state action when it removes a candidate from a State's primary election ballot.
3. Whether an Eleventh Amendment defense raised by a State is jurisdictional and therefore must be resolved before the merits of a case can be addressed.

LIST OF PARTIES

The names of all Petitioners are as follows:

Libertarian Party of Ohio, Charlie Earl, Aaron Harris, Kevin Knedler.

The names of all Respondents are as follows:

Jon Husted, in his official capacity as Ohio Secretary of State, State of Ohio (Intervenor), Gregory Felsoci (Intervenor).

CORPORATE DISCLOSURE

Rule 29.6 requires the identification of the party's "parent corporations" and "any publicly held company that owns 10% or more of the [party's] stock," if the petition is filed on behalf of one or more nongovernmental corporate petitioners.

Pursuant to Supreme Court Rule 29.6, Petitioners state that the Libertarian Party of Ohio is the Ohio political party affiliate of the national Libertarian Party. It has no parent corporation and no shares of stock that are owned by a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Libertarian Party of Ohio (LPO), *et al.*, respectfully request certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit (entered July 29, 2016). Petitioners sought emergency relief (No. 16A181) from this Court on August 23, 2016. Justice Kagan called for a response and referred the emergency motion to the full Court on August 29, 2016, which denied the Application.



OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Moore, Clay, and Donald, JJ.) is reported at 831 F.3d 382 (6th Cir. 2016), and is included in the Appendix (App., *infra*, at 1). The final judgment of the United States District Court for the Southern District of Ohio is not reported and is reproduced in the Appendix (App., *infra*, at 79). A prior relevant order of the District Court awarding Petitioners partial summary judgment and Respondents partial summary judgment is not reported and is reproduced in the Appendix (App., *infra*, at 49).



STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 29, 2016. No rehearing was requested. The jurisdiction

of this Court is invoked pursuant to 28 U.S.C. § 1254(1).



**CONSTITUTIONAL, STATUTORY
AND RULES PROVISIONS INVOLVED**

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Eleventh Amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Sections 1 and 2 of Amended Substitute Senate Bill No. 193 (S.B. 193) made numerous changes to Ohio's election code. The definition of "minor political party" found in OHIO REV. CODE § 3501.01(F)(2) was changed to state:

"Minor political party" means any political party organized under the laws of this state that meets . . . the following requirements: . . .
 (b) The political party has filed with the secretary of state . . . a petition that meets the requirements of section 3517.01 of the Revised Code.

Section 3517.01(A)(1)(a) was changed to state:

A political party . . . is any group of voters that meets . . . the following requirements: . . . (b) The group filed with the secretary of state . . . a party formation petition that meets all of the following requirements:

- (i) The petition is signed by qualified electors equal in number to at least one per cent of the total for governor or nominees for presidential electors at the most recent election for such office.
- (ii) The petition is signed by not fewer than five hundred qualified electors from each of at least a minimum of one-half of the congressional districts in the state. . . .
- (iii) The petition declares the petitioners' intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding

general election, held in even-numbered years that occurs more than one hundred twenty-five days after the date of filing.

. . .

Section 3517.012(A)(1) was amended to provide:

When a party formation petition . . . is filed with the secretary of state, the new party comes into legal existence on the date of the filing and is entitled to nominate candidates to appear on the ballot at the general election, held in even-numbered years that occurs more than one hundred twenty-five days after the date of the filing.



STATEMENT OF THE CASE

Ohio has long placed significant hurdles in the paths of minor parties that seek to gain access to Ohio's ballot. Following a series of successful suits brought by LPO striking down these many hurdles, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, 497 Fed. Appx. 581 (6th Cir. 2012), on November 6, 2013 Ohio once again changed its ballot access law. These changes mark the focus of this renewed litigation.

Ohio's new ballot access law, S.B. 193,¹ made scattered changes to several provisions in the state's election code. Relevant here, Section 3 of S.B. 193 dissolved all minor political parties (including LPO). Sections 1 and 2 changed OHIO REV. CODE § 3517.01 to require that these now-dissolved parties (and any additional new parties) file with the Secretary "a party formation petition" supported by tens of thousands of signatures 125 days before general elections in order to re-qualify for ballot access. Only then could new parties' candidates qualify for Ohio's *general* election.

Senate Bill 193's new-party qualification process not only dissolved all minor parties, it also prevented all parties except Ohio's two major parties from holding primaries. This marked a significant change in Ohio law. Before S.B. 193 took effect all parties participated equally in Ohio's primaries. Senate Bill 193 changed OHIO REV. CODE § 3517.012 to require that candidates of new parties (including LPO) file nominating petitions with supporting signatures rather than be popularly elected in primaries. The candidates of the major parties, meanwhile, are still elected in primaries.

Ohio officially registers political parties' members through primaries. No alternative mechanism exists.

¹ S.B. 193 was a partisan measure passed to benefit Republicans. No Democrats joined the six Republicans who co-sponsored the bill in Ohio's General Assembly, and only one Democrat in either Chamber voted for it. Republican support, in contrast, was enormous in both Chambers. In the Ohio Senate, 20 of 23 Republicans supported it. In the Ohio House, 50 of 59 Republicans voted for it.

This exclusion of new parties from Ohio’s primary process therefore necessarily denies them the official memberships and official membership lists that Ohio creates for the established parties.

New parties are burdened in two discriminatory and severe ways.² First, party members (which new parties no longer have) are “wedded” to their parties for two years. One who votes in a party primary in Ohio, for example, cannot protest, circulate or sign the nominating papers of another party’s candidate. OHIO REV. CODE § 3513.05. Nor can she circulate the nominating petition of a new party that seeks to gain access under S.B. 193, *see* OHIO REV. CODE § 3517.012(B)(2) (as amended by S.B. 193), or run as either an independent or new party’s candidate. *See Morrison v. Colley*, 467 F.3d 503, 508 (6th Cir. 2006). Further, for a new-party candidate’s nominating petitions to comply with S.B. 193, the petition must be supported by voters who are not members of another political party. OHIO REV. CODE § 3517.012(B)(2) (as amended by S.B. 193). This means that one who votes in a primary cannot sign a new-party candidate’s nominating petition.

² The Sixth Circuit asserted that LPO misunderstands and “misstates Ohio law.” App., *infra*, at 36. If LPO misunderstands Ohio law, however, then so does Ohio’s Secretary of State. In response to the question, “Do I declare my political party affiliation when I register?”, his official web page states: “No. Under Ohio election law, you declare your political party affiliation by requesting the ballot of a political party in a partisan primary election.” *See* JON HUSTED, OHIO SECRETARY OF STATE, FREQUENTLY ASKED QUESTIONS: GENERAL VOTING & VOTER REGISTRATION (2015).

Second, the established parties are provided official lists of members (which new parties no longer have) by the State of Ohio. These state-created membership lists facilitate party-building, party-planning and fund-raising endeavors conducted by the established parties. New parties are denied both official members and official membership lists by S.B. 193.

LPO's challenge to S.B. 193 (filed on November 8, 2013) argued two federal constitutional violations. First, S.B. 193's tardy application to the 2014 election cycle violated the Due Process Clause. Second, S.B. 193's creation of two classes of recognized political parties – those with official members and those without – violated the Equal Protection Clause.

LPO named Ohio's Secretary of State as the relevant defendant under *Ex parte Young*, 209 U.S. 123 (1908). Because the State of Ohio had intervened, Petitioners added a challenge under Ohio's Constitution. Although the State of Ohio asserted that it was immune to Petitioners' state-law challenge because of the Eleventh Amendment, it waived immunity and actively defended Petitioners' claim under the federal Constitution.

On January 7, 2014, the District Court enjoined application of S.B. 193 to Ohio's 2014 election based on LPO's Due Process Clause claim. It reserved ruling, however, on the validity of S.B. 193 under state law and the Equal Protection Clause. Relief was therefore limited to the 2014 election.

LPO qualified several candidates for Ohio's 2014 primary, including a gubernatorial candidate (Charlie Earl). Under S.B. 193, if Earl had won 2% (following the 2014 election this increases to 3%) of the vote in the general election, LPO would have re-qualified as a political party for the next four years, been permitted to participate in future primaries (as an existing party), and enjoyed Ohio's full range of benefits afforded the major parties. To prevent this from happening and force LPO to re-qualify as a new party under S.B. 193, the Ohio Republican Party (ORP) concocted a plan to remove Earl from LPO's primary ballot.

With the assistance of the Republican governor's re-election staff, ORP duped an LPO member (Gregory Felsoci) into filing an administrative protest against Earl. Because of a technical violation of Ohio's circulator law by one of Earl's circulators, *see Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014), this protest proved successful. Earl was removed from the LPO primary ballot, LPO had no gubernatorial candidate in 2014, and LPO is now required by S.B. 193 to re-qualify as a new party (which means it will not have members).

On March 7, 2014 LPO amended its federal Complaint to challenge Earl's removal. Felsoci, still not knowing that ORP (or, bizarrely, anyone else) was behind his protest, intervened in the federal proceeding. Petitioners, the District Court and the Sixth Circuit all

suspected at this time that ORP was involved.³ Felsoci, however, professed ignorance and ORP's chair denied ORP's involvement in open court. Months later Petitioners learned through protracted (and contentious) discovery that Republican operatives had orchestrated Felsoci's protest. ORP spent hundreds of thousands of dollars to finance it.

On October 14, 2015 the District Court dismissed Petitioners' state-law challenge to S.B. 193 under the Eleventh Amendment. *See App., infra*, at 68. It also rejected Petitioners' Equal Protection Clause challenge to S.B. 193. *Id.* at 63.

Because of the dismissal of their state-law challenge and the need for prompt relief before the 2016 Primary, on January 19, 2016 Petitioners were forced to file their state-law challenge to S.B. 193 in state court. Petitioners had hesitated to do this because of the preclusion problems caused by splitting claims.

Several months later, on May 20, 2016, the District Court ruled that none of the conspirators behind Earl's removal, including ORP, had engaged in state action. *See App., infra*, at 96. LPO took an emergency appeal to the Sixth Circuit and argued, *inter alia*, that (1) S.B. 193 violated the Equal Protection Clause, (2) ORP had engaged in state action, and (3) the Eleventh Amendment did not bar federal jurisdiction over their state-law claim. On June 7, 2016, while this appeal was

³ The Sixth Circuit stated in its May 1, 2014 opinion rejecting LPO's interlocutory appeal that "Felsoci likely is the tool of the Republican Party." *Libertarian Party of Ohio*, 751 F.3d at 409.

pending, the state court rejected Petitioners' state-law challenge to S.B. 193.⁴

After expediting the appeal, the Sixth Circuit on July 29, 2016 rejected LPO's federal challenge to S.B. 193 and its claim that ORP engaged in state action. *See* App., *infra*, at 48. Notwithstanding the fact that S.B. 193 denied official membership to LPO as well as official membership lists, the Sixth Circuit ruled that "the Libertarian Party is not severely burdened by S.B. 193's requirement that it select candidates for the general-election ballot via petition, rather than by primary." App., *infra*, at 41. Applying this Court's *Anderson/Burdick* balancing test, *see Anderson v. Celebrezze*, 460 U.S. 790, 793-94 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the Sixth Circuit eschewed exacting scrutiny in favor of the equivalent of a rational basis test, noting that "the state has articulated a legitimate interest in its law, and this interest is sufficient in light of the Libertarian Party's claimed burdens." App., *infra*, at 44.

Further, with respect to the challenge ORP had orchestrated against Earl, the Sixth Circuit ruled that because "the Ohio Republican Party has not been 'assigned an 'integral part' in the election process' that is usually performed by the state," App., *infra*, at 23, its "filing a protest against a nomination petition under this statute [S.B. 193] – or having an agent file a protest," did not constitute state action. *Id.* at 24.

⁴ This state-court judgment is presently on appeal and if reversed will have no preclusive effect.

Last, without addressing the jurisdictional question raised by the Eleventh Amendment, the Sixth Circuit ruled that the state court’s June 7, 2016 judgment precluded Petitioners’ state-law claim in federal court. *See App., infra*, at 48.



REASONS FOR GRANTING THE WRIT

While “every minor difference in the application of laws to different groups” does not violate the Constitution, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), this Court has “held many times that invidious distinctions cannot be enacted without a violation of the Equal Protection Clause.” *Id.* This anti-discrimination principle is included in the framework constructed by *Anderson* and *Burdick* to assess the constitutionality of burdens on electoral rights:

when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state election law provision imposes only “reasonable, non-discriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.

Burdick, 504 U.S. at 434 (citations omitted).

I. This Court and Two Circuits Have Ruled that Discrimination in the Award of Official Membership Benefits to Political Parties Constitutes an Unconstitutional Burden on First and Fourteenth Amendment Rights.

The Sixth Circuit’s conclusion that Ohio’s refusal to register members and create official membership lists for new parties, while providing established parties these rights, is constitutionally trivial conflicts with the summary affirmance handed down by this Court in *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D.N.Y.), *summarily aff’d*, 400 U.S. 806 (1970). There, a three-judge District Court invalidated New York’s free supply of membership lists to established political parties (which had won more than 50,000 votes for governor) but not to other recognized political parties. 314 F. Supp. at 995. Those other recognized political parties had to pay. The District Court invalidated the measure, stating: “The State has shown no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need therefor.” *Id.* (citation omitted). This Court summarily affirmed, thereby recognizing that a free state-created membership list provides a “significant subsidy” that when selectively awarded must be tested by strict scrutiny.

The Second Circuit reached this same result a generation later in *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994), after New York re-passed essentially the same law. The Second Circuit concluded that “the effect

of these provisions . . . is to deny independent or minority parties . . . an equal opportunity to win the votes of the electorate.” *Id.* at 60 (citation omitted).

The Second Circuit in *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004), applied these precedents to enjoin enforcement of another New York party-membership law that discriminated against small political parties. According to the law, only political parties which won 50,000 votes in the last gubernatorial election could enroll official members. Like Ohio here, New York argued that it relied on voter registration merely to conduct its closed primaries. Small political organizations that ran candidates in general elections did not hold primaries.

While it recognized that New York’s scheme facilitated closed primaries, the Second Circuit disagreed that it did nothing else: “Parties use these enrollment lists to conduct closed primaries, but they also use the lists for many other purposes, such as identifying new voters, processing voter information, organizing and mobilizing Party members, fundraising, and other activities that influence the political process.” *Id.* at 416. The Second Circuit explained that “access to minimal information about political party affiliation is the key to successful political organization and campaigning.” *Id.* at 421 (citation omitted). Consequently, the Second Circuit concluded that “the burdens imposed on plaintiffs’ associational rights are severe,” *id.* at 420, and “the district court did not abuse its discretion in ruling that New York’s voter enrollment scheme could only

withstand constitutional challenge if New York were able to show a compelling state interest.” *Id.* at 421.

The Tenth Circuit reached this same result in *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984), which invalidated under *Anderson*’s balancing test a Colorado law that “prevented persons other than those affiliated with the two major political parties from obtaining and using [membership] information in a manner similar to that of the major parties.” This discrimination flowed from Colorado’s refusal to allow otherwise qualified minor political parties to officially register their members: “The electors of the Democrats and Republicans can designate their party affiliation by name on the voter registration form. Plaintiffs [voters and members of minor parties] are required to register as ‘unaffiliated.’” *Id.* Although the Tenth Circuit did not expressly state that the burden was severe, it ruled that “the refusal to permit such designation unnecessarily burdens the opportunity of the citizen and his party to promote their minority interests.” *Id.*

Baer’s result was explained and ratified by the Tenth Circuit in *Constitution Party of Kansas v. Kobach*, 695 F.3d 1140 (10th Cir. 2012). There, the Tenth Circuit ruled that *Baer* applied only to those political organizations that are recognized as proper parties under state law: “Because the plaintiffs in *Baer* met [Colorado’s statutory party requirements] . . . , we held that the Secretary could not refuse to permit [membership] registration with them.” *Id.* at 1147. Once political parties are recognized, like new parties in Ohio,

they cannot be denied equal access to official membership. *Cf. Iowa Socialist Party v. Nelson*, 909 F.2d 1175 (8th Cir. 1990) (refusing to extend *Baer* to groups that are not recognized as parties).

Ohio's membership preference for established parties is no different from New York's and Colorado's, both of which were invalidated in *Green Party* and *Baer*, respectively. Because the Sixth Circuit's decision conflicts with this Court's summary affirmance in *Socialists Workers Party* and those decisions of the Second and Tenth Circuits, certiorari is proper.

II. The Two Major Parties Engage in State Action By Removing Candidates from Ballots.

The Sixth Circuit concluded that ORP does not play an “integral part” in Ohio's primary process and did not engage in state action when it removed Earl. App., *infra*, at 23. The Sixth Circuit's conclusion contradicts this Court's state-action precedents and conflicts with those decisions of state and federal courts that have held that removing or rejecting candidates constitutes state action.

Smith v. Allwright, 321 U.S. 649 (1944), *Terry v. Adams*, 345 U.S. 461, 469 (1953) (plurality), and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality), all recognize that the two major parties play a unique and dominant role in America's electoral process. This trilogy of cases stands for the proposition that the two major parties are considered “state actors”

(and are subjected to constitutional norms) when they regulate (or manipulate) a state’s electoral machinery.

In *Allwright*, this Court concluded that the Democratic Party of Texas, which had forbade African-Americans from voting in its primaries, was engaged in state action. *Id.* at 664. *Terry v. Adams*, 345 U.S. 461 (1953) (plurality), reaffirmed this principle in the context of racial discrimination by the Jaybird Party. The Court observed that “[i]t is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage.” *Id.* at 469. “The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.” *Id.*

Morse borrowed from *Allwright* and *Terry* to hold that section 5 of the Voting Rights Act applies to major-party conventions. Justice Stevens, writing for a plurality, focused on the “host of special privileges [Virginia gave] to the major parties. . . .” *Id.* at 224 n.36. “It is perfectly natural, therefore, to hold that [Virginia] seeks to advance the ends of both the major parties.” *Id.*

Justice Breyer, together with Justices O’Connor and Souter, joined Justice Stevens’ judgment to form a majority. *Id.* at 235 (Breyer, J., concurring). Justice Breyer agreed that because the Republican Party used “a nominating convention that resembles a primary about as closely as one could imagine,” *id.*, and “avail[ed] itself of special state-law preferences, in

terms of ballot access and position,” it was a state actor. *Id.*

Lower courts have relied on these precedents to hold that a major party’s removal of a candidate from its primary ballot, or its rejection of the candidacy in the first instance, constitutes state action. In *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), for example, where the Texas Republican Party attempted to remove its candidate (who had won its primary) from the general election ballot, the Fifth Circuit stated: “There is no dispute that when Benkiser [the Texas Republican Party chair] applied the ineligibility statute to DeLay she did so as a state actor.” *Id.* at 589 n.9 (citing *Allwright*, 321 U.S. at 663); *see also Rice v. Elmore*, 165 F.2d 387, 391 (4th Cir. 1947) (“When these [party] officials participate in what is a part of the state’s election machinery, they are election officers of the state.”).

In *Wilson v. Hosemann*, 185 So.3d 370 (Miss. 2016), a Democratic Party candidate (Wilson) for President filed qualifying papers with the Mississippi Democratic Party in order to run in its 2016 primary. The Party mistakenly rejected his papers and failed to inform him of his rejection. *Id.* at 371, 373. The Mississippi Supreme Court ruled that this mistake constituted state action. *Id.* at 375; *see also Bentman v. Seventh Ward Democratic Executive Committee*, 421 Pa. 188, 203, 218 A.2d 261, 269 (1966) (holding that party’s conduct was state action).

ORP accepts many privileges from the State of Ohio. It controls the legislature, the governor's mansion, and all state-wide offices. The Sixth Circuit's conclusion that ORP does not thereby play an "integral part" in Ohio's electoral process when it removes candidates contradicts this Court's holdings and conflicts with those of other courts. Certiorari is proper.

III. The Circuits are Split Over Whether A State's Eleventh Amendment Defense Must Be Resolved Before the Merits of a Case.

The District Court dismissed Petitioners' state-law claim on Eleventh Amendment grounds. The Sixth Circuit affirmed on the belated alternative ground that claim preclusion (*res judicata*) barred Petitioners' state-law claim. App., *infra*, at 46. Following Circuit precedent, it skipped the Eleventh Amendment question and resolved Respondents' affirmative defense in their favor. App., *infra*, at 48.

The Circuits are split over whether the approach taken by the Sixth Circuit is proper. At least three Circuits have ruled under *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), that Eleventh Amendment issues are jurisdictional and must be decided before the merits of a case can be addressed. See *United States v. Texas Tech University*, 171 F.3d 279, 285-86 (5th Cir. 1999); *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133 (9th Cir. 2012); *Thompson v. Colorado*, 278 F.3d 1020, 1024 (10th Cir. 2001).

At least five Circuits have ruled to the contrary. See *United States ex rel. Long v. SCS Business & Technical Institute*, 173 F.3d 890, 898 (D.C. Cir. 1999); *Parella v. Retirement Board of Rhode Island Employee Retirement System*, 173 F.3d 46, 53 (1st Cir. 1999); *In re Hechinger Investment Co. of Delaware*, 335 F.3d 243, 250 (3d Cir. 2003); *Strawser v. Atkins*, 290 F.3d 720, 730 (4th Cir. 2002); *Floyd v. Thompson*, 227 F.3d 1029, 1035 (7th Cir. 2000); *Gordon v. City of Kansas City*, 241 F.3d 997, 1005 n.7 (8th Cir. 2001).

Both the Second and Eleventh Circuits appear to have reached internal splits. Compare *Ret. Sys. of Alabama v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 431 (2d Cir. 2004) (addressing Eleventh Amendment first), with *Dotson v. Griesa*, 398 F.3d 156, 177 (2d Cir. 2005) (addressing statutes first); contrast *Seaborn v. Florida Department of Corrections*, 143 F.3d 1405, 1407 (11th Cir. 1998) (stating that Eleventh Amendment must be addressed first), with *McClendon v. Georgia Department of Community Health*, 261 F.3d 1252, 1258 (11th Cir. 2001) (stating Court has discretion).

The Sixth Circuit has followed a middle ground; where a State alternatively invokes the Eleventh Amendment a federal court may proceed directly to the merits, see *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469, 476 (6th Cir. 2006), including affirmative defenses raised by the State. See *National Parks Conservation Ass'n v. Tennessee Valley Authority*, 480 F.3d 410, 416 (6th Cir. 2007).

Because of this divisive split in the Circuits' treatment of the Eleventh Amendment, certiorari is proper.



CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LIBERTARIAN PARTY OF OHIO;)	
KEVIN KNEDLER; AARON HARRIS;)	
CHARLIE EARL,)	
<i>Plaintiffs-Appellants,</i>)	No. 16-3537
<i>v.</i>)	
JON HUSTED, Secretary of State,)	
<i>Defendant-Appellee,</i>)	
STATE OF OHIO;)	
GREGORY A. FELSOCI,)	
<i>Intervenors-Appellees.</i>)	

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:13-cv-00953 – Michael H. Watson, District Judge.

Decided and Filed: July 29, 2016

Before: MOORE, CLAY, and DONALD, Circuit Judges.

COUNSEL

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State of Ohio. Steven W. Tigges, John W. Zeiger, ZEIGER, TIGGES & LITTLE LLP, Columbus, Ohio, for Appellee Felsoci.

OPINION

KAREN NELSON MOORE, Circuit Judge. The Libertarian Party of Ohio (the “Libertarian Party,” “the Party,” or “LPO”), together with members of its party leadership and its 2014 gubernatorial candidate, appeal from the district court’s grant of summary judgment in favor of Ohio Secretary of State Jon Husted, the State of Ohio, and Gregory Felsoci. The Libertarian Party raises three issues on this appeal: (1) whether state actors selectively enforced Ohio Revised Code § 3501.38(E)(1) against Libertarian Party candidates in violation of the First and Fourteenth Amendments; (2) whether SB 193 violates the Equal Protection Clause of the Fourteenth Amendment in requiring newly created minor parties to nominate candidates for the general election by petition, rather than by primary election; and (3) whether the State of Ohio was entitled to Eleventh Amendment immunity on the Libertarian Party’s state-law claim. For the reasons discussed below, we **AFFIRM**.

I. BACKGROUND

This case arises out of a long history of challenges to Ohio election laws, and specifically challenges

brought by the Libertarian Party to access the ballot in Ohio. To best understand the current dispute, a brief foray into this background is needed.

A. A Recent History of Minor Party Ballot Access in Ohio

As our Circuit explained in a related opinion, “the LPO has struggled to become and remain a ballot-qualified party in Ohio through frequent litigation.” *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 405 (6th Cir. 2014). Throughout this struggle, “[t]he LPO has successfully challenged Ohio laws burdening its access to the ballot,” *id.* including a significant victory in 2006 in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006).

In *Blackwell*, we considered Ohio’s then-existing “two methods by which a party c[ould] qualify for the primary election” and reach the general-election ballot. *Id.* at 582. First, “[a]ny party that, in the preceding state election, receive[d] at least five percent of the vote for its candidate for governor or president automatically qualife[d] for the next statewide election.” *Id.* at 582-83. Second, parties receiving less than the five-percent threshold needed to “file a petition no later than 120 days prior to the date of the primary election [and 364 days prior to the general election] that contain[ed] the number of signatures equal to one percent of the total votes cast in the previous election.” *Id.* at 583. A party that failed to meet these requirements was barred from “participat[ing] in the primary and

[was] thus prevented from appearing on the general election ballot.” *Id.*

The Libertarian Party argued that this law violated its First and Fourteenth Amendment rights, and we agreed. Considering the signature requirement and the extremely early petition-filing deadline in combination, we held that the law “impose[d] a severe burden on the First Amendment rights of the LPO,” *id.* at 591, and that the state failed to justify this burden with a sufficiently weighty state interest. *Id.* at 591-95.

Following our decision in *Blackwell*, “the Ohio General Assembly [took] no action to establish ballot access standards for minor political parties.” *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1009 (S.D. Ohio 2008). In the absence of legislation, in 2007, Ohio’s Secretary of State issued Directive 2007-09 (the “Directive”). *Id.* at 1010. The Secretary’s Directive maintained Ohio’s “requirement that minor parties nominate their candidates by primary election,” but changed the party qualification process by requiring minor parties to “obtain petition signatures equal to one-half of one percent of the votes cast for governor in the” last general election and to “file nominating petitions 100 days before the primary,” still “nearly a full year before the . . . general election.” *Id.*

The Libertarian Party challenged the Directive in federal court, and the district court granted a preliminary injunction preventing the Directive from going into effect. First, the district court concluded that the

federal constitution mandates that “only the legislative branch” of a state, not a state’s Secretary of State, “has the authority . . . to prescribe the manner of electing candidates for federal office.” *Id.* at 1011. Moreover, the district court concluded that, even assuming that the Secretary had the authority to issue the Directive, it was likely unconstitutional nonetheless because the Directive still imposed impermissible burdens on minor political parties. *Id.* at 1013. “[I]n the absence of constitutional, ballot access standards” in Ohio, the district court ordered that the Libertarian Party’s candidates “be placed on the 2008 general election ballot for the state of Ohio.” *Id.* at 1015-16. The Secretary of State granted the Libertarian Party ballot access through additional directives in 2011. *See Libertarian Party of Ohio v. Husted*, No. 2:11-CV-722, 2011 WL 3957259 (S.D. Ohio Sept. 7, 2011), *vacated as moot*, 497 F. App’x 581 (6th Cir. 2012).

In 2011, Ohio enacted HB 194, which required that minor parties file petitions with the requisite number of signatures 90 days before the primary, “a mere 30 days” earlier than the law found unconstitutional in *Blackwell*. *Id.* at *1. At the same time, the law “did nothing” to change the quantity of signatures required. *Id.* Finding that the law imposed an unconstitutional burden on the ability of minor parties to access the ballot, a federal district court granted a preliminary injunction and prevented Ohio from implementing the statute’s changes. *Id.* at *6. HB 194 was later repealed following a referendum. *Libertarian Party of Ohio*, 497 F. App’x at 583. The Ohio Secretary

of State subsequently issued an additional directive in 2013 that “continued the practice of recognizing minor political parties and granting them access to the ballot for both the primary and general elections.” *Libertarian Party of Ohio v. Husted*, No. 2:13-CV-953, 2014 WL 11515569, at *2 (S.D. Ohio Jan. 7, 2014).

The Libertarian Party initiated the current lawsuit against Secretary Husted on September 25, 2013, in the U.S. District Court for the Southern District of Ohio. R. 1 (Compl. at 1) (Page ID #1). The Libertarian Party’s complaint alleged claims under the First Amendment of the U.S. Constitution against Ohio’s law that imposed residency requirements on petition circulators. *Id.* at 6-7 (Page ID #6-7). The State of Ohio intervened as a defendant. R. 5 (Mot. to Intervene) (Page ID #23). The district court preliminarily enjoined enforcement of Ohio’s circulator law on November 13, 2013. R. 18 (11/13/13 D. Ct. Op. at 1) (Page ID #143).

B. SB 193 and the Libertarian Party’s Amended Complaint

SB 193 was signed into law on November 6, 2013, and made several changes to the methods by which minor parties can qualify for the ballot in Ohio. *Libertarian Party of Ohio*, 2014 WL 11515569, at *2. SB 193 explicitly voided the Secretary’s prior directives that qualified the Libertarian Party and other minor parties for the ballot, resulting in the requirement that these parties would need to qualify for the ballot as new parties. *Id.*; see SB 193, 130th Gen. Assemb., at § 3

(Ohio 2013). The law also amended Ohio law to create two methods by which a political party can qualify as a “[m]inor political party” in Ohio. *See* Ohio Rev. Code § 3501.01(F)(2).

First, a political party may qualify by obtaining at least “three percent of the total vote cast” for governor or president “at the most recent regular state election.” § 3501.01(F)(2)(a). A party that obtains minor-party status via this vote-counting method remains qualified as a minor party “for a period of four years.” *Id.* Second, for new political parties that were not on the ballot in the preceding election or for parties that failed to meet the three-percent threshold in the prior election, SB 193 provides that a political party may qualify as a minor party through petition. § 3501.01(F)(2)(b). A party forming via petition must: (1) collect signatures from “qualified electors equal in number to at least one percent of the total vote for governor or president” at the most recent election; (2) file a petition that is signed by at least “five hundred qualified electors from each of at least . . . one-half of the congressional districts in” Ohio; and (3) file the petition more than 125 days before the upcoming general election. § 3517.01(A)(1)(b). The Secretary of State must determine the sufficiency of the petition at least 95 days before the general election. § 3517.012(A)(2)(d).

SB 193 removed the requirement that all parties nominate their candidates for the general election through a primary. Instead, a petition-formed party must nominate a candidate for the general election by

petition. § 3517.012. This candidate-nominating petition must be filed “[n]ot later than one hundred ten days before the” general election. § 3517.012(B)(1). For statewide office, the candidate-nominating petition must be “signed by at least fifty qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years.” § 3517.012(B)(2)(a). For local office, five qualifying signatures are required. § 3517.012(B)(2)(b).

SB 193 also established processes by which individuals can protest the filing of a party-formation petition or a candidate-nominating petition. § 3517.012(B)(3)(b). Specifically, written protests against candidate-nominating petitions “may be filed by any qualified elector eligible to vote for the candidate whose nominating petition the elector objects to not later than the seventy-fourth day before the general election,” and the protest may challenge the sufficiency of the petition on several grounds. § 3513.263. Candidates who file “insufficient” petitions may “not appear on the ballot in the general election.” § 3517.012(C)(2).

On November 8, 2013, the Libertarian Party amended its complaint in the Southern District of Ohio to add counts challenging SB 193. R. 16 (Am. Compl. at 16) (Page ID #101). Count Three alleged a due process and First Amendment challenge to SB 193 against Secretary Husted; Count Four alleged an Equal Protection and First Amendment challenge to S.B. 193 against Secretary Husted; and Count Five alleged a

challenge under the Ohio Constitution against both Secretary Husted and the intervenor-defendant State of Ohio. *Id.* at 15-18 (Page ID #101-04). The State of Ohio answered and asserted Eleventh Amendment immunity to Count Five. R. 21 (State of Ohio Answer at 11) (Page ID #222).

On January 7, 2014, the district court preliminarily enjoined SB 193 from taking effect for the 2014 election, finding that because the Libertarian Party expected to be ballot-qualified for the 2014 election under the Secretary's 2013 Directive, the retroactive application of SB 193 to that election – voiding the Secretary's Directive and requiring that the Libertarian Party start from scratch to qualify for the ballot – violated due process. *Libertarian Party of Ohio v. Husted*, No. 2:13-CV-953, 2014 WL 11515569, at *10-11 (S.D. Ohio Jan. 7, 2014). The district court did not address claims that related to the Ohio Constitution or the federal Equal Protection Clause.

C. The 2014 Election and Felsoci's Protest of LPO Candidates

As a result of the district court's injunction, the Libertarian Party remained a recognized political party in Ohio, and it continued its efforts to nominate candidates to appear on the ballot for the 2014 primary election. The political drama that ensued forms a large basis of the current appeal. In November 2013, the Libertarian Party hired Oscar Hatchett and Sara Hart to collect signatures for the Party's statewide candidates

such as Charlie Earl, the 2014 LPO gubernatorial candidate. *Libertarian Party of Ohio*, 751 F.3d at 407. Hatchett and Hart, together with other circulators, collected a sufficient number of signatures; after the signatures were verified by the local boards of elections, Secretary Husted certified Earl as a Libertarian candidate for the 2014 primary. *Id.* at 407-09.

On February 21, 2014, Earl's certification was protested by Gregory Felsoci, an apparent member of the Libertarian Party. *Id.* at 409. In a prior opinion, we described Felsoci as a likely "tool of the Republican Party." *Id.* After being shown documents from "a Republican friend, John Musca," Felsoci came to believe that "LPO was gathering 'votes' without disclosing that those who gathered them were being paid to do so." *Id.* Musca asked Felsoci to get involved with pursuing the matter, and Felsoci agreed. "Soon afterward, the Zeiger, Tigges, and Little law firm contacted Felsoci and offered its assistance." *Id.* Felsoci did not pay legal fees to Zeiger, nor was Felsoci aware of who was paying the attorney fees. *Id.* Felsoci protested Earl's certification on the basis of Ohio Revised Code § 3501.38(E)(1), arguing that the statute "requires independent contractors, not just employees, to complete the employer information box," which certain circulators failed to do. *Id.*

After voluminous discovery in the district court, the Libertarian Party learned more about the facts leading up to Felsoci's protest. This information primarily centered on Terry Casey, an appointed member of the Ohio Board of Personnel Review, self-employed

political consultant, and member of the Republican Party. R. 241-1 (8/28/14 Casey Dep. at 8-12) (Page ID #6215-19). Beginning on February 14, 2014, one week before the filing of Felsoci's protest, Casey sent several emails to the personal email addresses of Matt Carle, Dave Luketic, and Jeff Polesovsky, individuals associated with John Kasich's gubernatorial campaign and with the Ohio Republican Party. *See* R. 335-3 (July 6 Docs. at 2-4) (Page ID #8438-40); R. 335-2 (9/16/15 Casey Dep. at 8-10) (Page ID #8345-47). Casey discussed a conversation that he had had with his lawyer, John Zeiger, concerning the signature-gathering efforts of Libertarian candidates and the legal bases upon which the signatures might be challenged under Ohio law. R. 335-3 (July 6 Docs. at 3-4) (Page ID #8439-40). Casey continued to send similar emails throughout the week, noting a "need to keep digging and digging on Oscar [Hatchett]. He could be a key 'star' in this future production/show." *Id.* at 6 (Page ID #8442); *see also* R. 240-1 (Casey Email Ex. at 7) (Page ID #6164).

Chris Schrimpf, the Ohio Republican Party's Communications Director, submitted a public-records request to the Secretary of State's Office on February 13, 2014, "for all Form 14's filed for all Libertarian candidates for statewide office." R. 335-3 (July 6 Docs. at 9) (Page ID #8445). On February 18, 2014, Luketic forwarded the forms that Schrimpf received to Casey. *Id.* at 8-9 (Page ID #8444-45). Casey emailed his attorneys on February 18 – with Polesovsky, Luketic, and Carle blind copied – and noted that Hatchett and Hart's petitions did not "ha[ve] anything filled out to reflect that

they admitted being paid for this petition work.” R. 240-1 (Casey Email Ex. at 8) (Page ID #6165). On February 19, Luketic sent the group a “validity report” analyzing the validity of Earl’s petition signatures. *Id.* at 13 (Page ID #6170).

On February 19, 2014, Casey emailed Polesovsky and Luketic and indicated his ongoing search for “a Libertarian potential client.” R. 335-3 (July 6 Docs. at 13) (Page ID #8449). According to Casey, he “asked a number of different people around the state if they knew of any Libertarian folks . . . who might have an interest in filing.” R. 335-2 (9/16/15 Casey Dep. at 29-30) (Page ID #8366-67). At some point, Felsoci was identified as a potential Libertarian Party member who would have standing to file a protest against a Libertarian candidate. *See id.* at 34-35 (Page ID #8371-72). Luketic forwarded Felsoci’s voting history to Casey on February 20, 2014. R. 335-3 (July 6 Docs. at 23) (Page ID #8459). On February 21, 2014, Polesovsky gave Casey the contact information for an attorney, and Casey sent Felsoci’s name and phone number to the attorney to assist Felsoci in signing the documents needed for filing his protest. R. 335-3 (July 6 Docs. at 35) (Page ID #8471); R. 335-10 (Oct. 6 Docs. at 22) (Page ID #8589); *see also* R. 335-2 (9/16/15 Casey Dep. at 36) (Page ID #8373).

The cast of characters relevant to this appeal also includes Matthew Damschroder, the Director of Elections for the Ohio Secretary of State. R. 227-1 (8/26/14 Damschroder Dep. at 7) (Page ID #5226). In December 2013, Luketic sent Damschroder a text message asking

Damschroder if there were “any petitions gathering from [] Charlie Earl the LIB candidate?” R. 227-1 (8/26/14 Damschroder Dep. at 305 (Ex. 16)) (Page ID #5524). Damschroder responded that he had not heard anything but that he would “keep [his] ear to [the] ground.” *Id.* Casey testified that, at some point around the date of February 17, he “mentioned” to Damschroder that he “w[as] looking at doing some kind of” protest filing. R. 241-1 (8/28/14 Casey Dep. at 54-55) (Page ID #6261-62). On February 18, 2014, Damschroder emailed members of his staff and indicated that he “got a call tonight that a protest is likely to come by Friday against Earl, probably from an unaffiliated voter . . . and [it] will be based on” payment disclosure information. R. 227-1 (8/26/14 Damschroder Dep. at 257 (Ex. 3)) (Page ID #5476). Damschroder does not remember who made the phone call that he referenced in his email, although he testified that “[i]t could have been” Casey. R. 247 (9/29/14 H’rg Tr. Vol. 1 at 123) (Page ID #6609).

The deadline for filing a protest was February 21, 2014, at 4:00 PM. Damschroder emailed his staff at 3:32 PM on February 21 and stated that “[i]f any protests are filed, please let me know as soon as they come in.” R. 227-1 (8/26/14 Damschroder Dep. at 259 (Ex. 5)) (Page ID #5478). Damschroder also emailed his staff earlier in the afternoon and instructed them that “if we get a protest filed with us today, even if it is after 4pm, please accept it, date/timestamp it, and give it to Sally [Warren] to disseminate.” *Id.* at 260 (Ex. 6) (Page ID #5479).

Felsoci filed his protest in advance of the 4 PM deadline. The Secretary's Office then "referred the protest to Bradley Smith, a hearing officer, to conduct a hearing and issue a report and recommendation as to the disposition of the protest." *Libertarian Party of Ohio*, 751 F.3d at 409-10. A hearing was held on March 4, 2014, and Smith issued a report on March 7, 2014, concluding that the circulators failed to make necessary disclosures in the employer-information box. *Id.* at 410. Smith recommended that these petition papers be ruled invalid. *Id.* Secretary Husted adopted Smith's recommendation; as a result of Secretary Husted invalidating these signatures, Earl did not have enough signatures to be eligible to appear as a candidate in the primary election. *Id.*

Seeking to avoid the serious consequences of this disqualification, the Libertarian Party filed a second amended complaint in the district court on March 7, 2014, R. 56-1 (Second Am. Compl. at 1) (Page ID #989), in addition to a motion for a preliminary injunction and temporary restraining order. R. 57 (Pl. Mot. for Prelim. Inj. and TRO at 1) (Page ID #1041). The Libertarian Party's second amended complaint brought several challenges against the employer-disclosure requirements of § 3501.38(E)(1). Felsoci moved to intervene as a defendant, and the district court granted his motion on March 20, 2014. R. 85 (03/20/14 D. Ct. Order at 3) (Page ID #2189). After holding an evidentiary hearing, the district court denied the Libertarian Party's motion for a preliminary injunction on March 19, 2014. R. 80 (03/19/14 D. Ct. Op. at 1) (Page ID

#2146). The Libertarian Party appealed the denial of the preliminary injunction to this court, and we affirmed on May 1, 2014, concluding that the Libertarian Party had not “establish[ed] a substantial likelihood of success on the merits of its due process challenge” or its First Amendment overbreadth challenge. 751 F.3d at 421, 424.

D. Third Amended Complaint and Proceedings Below

The Libertarian Party filed a third amended complaint on September 11, 2014. R. 188 (Third Am. Compl.) (Page ID #3796). Among other claims, the Libertarian Party asserted that Felsoci, Casey, and the Secretary of State’s office selectively enforced the employer-disclosure requirements of § 3501.38(E)(1) against the Libertarian Party in violation of the First and Fourteenth Amendments. *Id.* at 50 (Page ID #3845). On September 15, 2014, the Libertarian Party filed motions for a preliminary injunction and a temporary restraining order, seeking to place its candidates’ names on the ballot for the 2014 general election. R. 192 (Pl. Fourth Mot. for Prelim. Inj.) (Page ID #3877); R. 194 (Mot. for TRO) (Page ID #3911). The district court denied the Libertarian Party’s request for a temporary restraining order on the basis of laches, R. 225 (9/24/14 D. Ct. Op. at 2) (Page ID #5142), and denied the Libertarian Party’s motion for a preliminary injunction because the Party could not establish that Secretary Husted’s decision was influenced by political animus or that Felsoci engaged in state action

in filing his protest, R. 260 (10/17/14 D. Ct. Op. at 19, 22) (Page ID #7092, 7095).

Following the district court's denial of a preliminary injunction, the parties filed motions and cross-motions for summary judgment. *See, e.g.*, R. 261-1 (Mem. in Supp. of Mot. for Summ. J.) (Page ID #7112); R. 267 (Def. Resp. and Cross-Motion for Summ. J. at 1) (Page ID #7191). These motions addressed the Libertarian Party's claims that SB 193 violates the Ohio Constitution and the Equal Protection Clause – claims that the district court did not address in its January 7, 2014 preliminary-injunction ruling – in addition to the claim that § 3501.38(E)(1) was selectively enforced in violation of the First and Fourteenth Amendments. *See, e.g., id.* at 11, 17 (Page ID #7209, 7215).¹ The district court denied the Libertarian Party's claim that SB 193 violated the Equal Protection Clause, both on its face, R. 285 (03/16/15 D. Ct. Op. at 32) (Page ID #7516), and as applied, R. 336 (10/14/15 D. Ct. Op. at 14) (Page ID #8700). The district court also dismissed Count Five

¹ Other third parties not currently before us intervened as plaintiffs and asserted Equal Protection and First Amendment challenges to SB 193; these intervening plaintiffs also filed motions for summary judgment, R. 165 (Intervening Pl. Mot. for Summ. J. at 1) (Page ID #3261), to which the state responded and moved for cross-summary judgment, *see, e.g.*, R. 185 (State Cross-Mot. for Summ. J. on Intervenor-Plaintiff Challenge at 1). LPO joined in the intervening plaintiffs' motion for summary judgment in filing its motion for summary judgment, and Secretary Husted responded to LPO's motion for summary judgment by referring to his prior cross-motion. For simplicity, we avoid an exhaustive account of this complicated procedural history.

(regarding the Ohio Constitution) as barred by the Eleventh Amendment. *Id.* at 18 (Page ID #8704).

The district court permitted discovery to continue with regards to the Libertarian Party's selective-enforcement claim, *id.* at 21 (Page ID #8707), and the parties filed additional summary-judgment motions that addressed the selective-enforcement claim alone, *see* R. 338 (Pl. Renewed Mot. for Summ. J. at 1) (Page ID #8717); R. 344 (Husted Count Seven Mot. for Summ. J. at 1) (Page ID #8747); R. 346 (Felsoci Count Seven Cross Mot. for Summ. J. at 1) (Page ID #8767). On May 20, 2016, the district court granted summary judgment in favor of the defendants on the selective-enforcement claim. *Libertarian Party of Ohio v. Husted*, ___ F. Supp. 3d ___, 2016 WL 2977286, at *1 (S.D. Ohio May 20, 2016). The district court entered final judgment on the same day, R. 370 (Judgment at 1) (Page ID #8948), and LPO timely appealed, R. 371 (Notice of Appeal at 1) (Page ID #8957).

II. DISCUSSION

A. Federal Claims

On appeal, the Libertarian Party raises two challenges under the U.S. Constitution. First, the Libertarian Party contends that Felsoci, Casey, the Ohio Republican Party, and Damschroder selectively enforced Ohio Revised Code § 3501.38(E)(1) against the Libertarian Party in violation of the First and Fourteenth Amendments. Second, the Libertarian Party argues that SB 193 violates the Equal Protection Clause

because SB 193 denies the Party the opportunity to participate in the primary election.

1. Mootness

Prior to addressing the merits, we must first determine our jurisdiction to hear this case. “[A] federal court has a continuing duty to ensure that it adjudicates only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties.” *Blackwell*, 462 F.3d at 584. “If ‘the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,’ then the case is moot and the court has no jurisdiction.” *Id.* (quoting *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979)). Here, LPO’s claims arose in advance of the 2014 election, an election that has already occurred. There is an exception to the mootness doctrine, however, for “disputes capable of repetition, yet evading review.” *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). “The exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Id.* (internal quotation marks omitted).

Secretary Husted and the State of Ohio do not assert that the Equal Protection challenge to SB 193 is moot, and for good reason. Courts have repeatedly emphasized that “[l]egal disputes involving election laws

almost always take more time to resolve than the election cycle permits,” and thus election-law challenges typically satisfy the first prong of the exception “easily.” *Blackwell*, 462 F.3d at 584. Moreover, parties that assert challenges to ballot-access laws frequently satisfy the second prong as well because it is “likely that the [party] will once again seek to place candidates” on the ballot and these parties will once again “face the requirements” imposed by a still-existent election law when they do. *Id.* at 584-85; *see also Lawrence v. Blackwell*, 430 F.3d 368, 371-72 (6th Cir. 2005). LPO’s constitutional challenge to SB 193’s requirements is not moot.

Secretary Husted and the State of Ohio do contend, however, that the conclusion of the 2014 election has mooted the Libertarian Party’s selective-enforcement claim. Husted Appellee Br. at 13. We disagree. As stated above, the Libertarian Party intends to run candidates in the future. Reply Br. at 19. The Libertarian Party asserts that members of the Ohio Republican Party and Ohio state government have conspired and will continue to conspire to selectively enforce election laws against it in order to remove its candidates from the ballot. *See id.* at 19-20. “The Supreme Court has stated that the purpose of the second prong [of the capable-of-repetition exception] is to determine ‘whether the controversy was *capable* of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not.” *Lawrence*, 430 F.3d at 371 (quoting *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988)).

The selective-enforcement controversy alleged by the Libertarian Party is capable of recurring, particularly given the “‘somewhat relaxed’ repetition standard” that our Circuit recognizes in election cases. *Blackwell*, 462 F.3d at 585 (quoting *Lawrence*, 430 F.3d at 372). We thus turn to the merits.

2. Selective-Enforcement Claim

The Libertarian Party first argues that the district court erred in granting summary judgment in favor of the defendants on the Libertarian Party’s selective-enforcement claim. We review the district court’s grant of summary judgment de novo. *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 542 (6th Cir. 2014). Summary judgment is appropriate only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Libertarian Party argues that Felsoci, Casey, Damschroder, and others conspired to selectively enforce Ohio Revised Code § 3501.38(E)(1) in violation of the Libertarian Party’s First and Fourteenth Amendment rights. The Libertarian Party brought this action under 42 U.S.C. § 1983. “Section 1983 makes liable only those who, while acting under color of state law, deprive another of a right secured by the Constitution

or federal law.” *Romanski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005). A selective-enforcement claim requires the plaintiff to demonstrate the following elements:

First, [the state actor] must single out a person belonging to an identifiable group, such as . . . a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to.

Stemler v. City of Florence, 126 F.3d 856, 873 (6th Cir. 1997) (internal quotation marks omitted). The district court entered summary judgment in favor of the defendants because the Libertarian Party could not establish state action. *Libertarian Party of Ohio*, 2016 WL 2977286, at *7. We agree with the district court.

The Libertarian Party does not contend that Secretary Husted himself selectively enforced or applied Ohio Revised Code § 3501.38(E)(1). *See* Appellant Br. at 31. The Libertarian Party also acknowledges that Felsoci is a private individual and not a state actor. *Id.* at 32. The Libertarian Party argues, however, that it can establish state action because the Ohio Republican Party, members of the Kasich Campaign, and Casey are state actors, and that these individuals also conspired with Damschroder, a state official in Secretary

Husted's office, to selectively enforce the law against only Libertarian candidates. *Id.* at 31.

a. The Libertarian Party Has Not Demonstrated that the Ohio Republican Party or the Kasich Campaign Engaged in State Action Here

The Libertarian Party contends that the Ohio Republican Party, together with Casey and members of the Kasich Campaign, selectively enforced § 3501.38(E)(1) by using Felsoci as an “innocent agent” to protest only Libertarian candidates. Appellant Br. at 32. The Libertarian Party asserts that the Ohio Republican Party is a state actor because “[c]ourts across the country have ruled that the two major parties’ state affiliates . . . are governmental actors when they regulate the electoral process.” *Id.* The cases upon which the Libertarian Party relies, however, are meaningfully different from the case at hand.

In *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944), the Supreme Court held that the Democratic Party of Texas’s whites-only primary violated the Constitution. The Court held that Texas state law “entrusted” the party “with the determination of the qualifications of participants in the primary,” *id.* at 664, and “this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the

participants in a primary election,” *id.* at 663. Similarly, in *Terry v. Adams*, 345 U.S. 461 (1953), a plurality of the Court held that the “Jaybird Association,” a private “Democratic ‘Club [.]’” that held a primary, *id.* at 466, was a state actor for purposes of its primary because “[t]he Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county,” *id.* at 469-70.

In considering these precedents, our Circuit has explained that the Court in *Terry* “did not assert that the Jaybirds had become a state actor for every purpose,” but rather the Court held that the private club was a state actor “insofar as they had been assigned an ‘integral part’ in the election process, a governmental function,” by the state. *Banchy v. Repub. Party of Hamilton Cty.*, 898 F.2d 1192, 1196 (6th Cir. 1990) (quoting *Terry*, 345 U.S. at 470). “The primary election cases do not hold that a political party is part of the state, or that any action by a political party other than conducting an election is state action.” *Id.* (internal quotation marks omitted). “The doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce ‘the uncontested choice of public officials.’” *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (quoting *Terry*, 345 U.S. at 484) (Clark, J., concurring).

Here, the Ohio Republican Party has not been “assigned an ‘integral part’ in the election process” that is usually performed by the state. *Banchy*, 898 F.2d at

1196; *see also Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003) (“Under the public function test, a private party is deemed a state actor if he or she exercised powers traditionally reserved exclusively to the state,” such as “holding elections.”). By filing a protest against a nomination petition under this statute – or having an agent file a protest – the Ohio Republican Party is not engaging in state action. To the contrary, any private citizen with standing is authorized by Ohio law to file a protest against a candidate’s nominating petition. Ohio Rev. Code §§ 3517.012(B)(3)(b) & 3513.263; *see also Nader v. McAuliffe*, 593 F. Supp. 2d 95, 102 (D.D.C. 2009) (“[T]he fact that private citizens may file challenges under the ballot access statutes is antithetical to the assertion that doing so is a function traditionally exclusively reserved to the States.”).

The Libertarian Party also asserts that members of the Kasich Campaign engaged in state action, but the Libertarian Party’s opening brief does not argue why this is so apart from stating conclusively that the Kasich Campaign acted as an agent of the Ohio Republican Party. *See* Appellant Br. at 32. To the extent that individuals involved with the Kasich Campaign were involved in text and email exchanges with Casey, the Libertarian Party has not demonstrated that these individuals acted on behalf of the Kasich Campaign team in their discussions with Casey, let alone that they acted on behalf of the governor’s office. *See Federer v. Gephardt*, 363 F.3d 754, 759 (8th Cir. 2004) (dismissing complaint for failing to allege state action because the complaint alleged only “that the defendants acted on

behalf of [a Congressman] as a political candidate and private person,” not as a government official). The Libertarian Party has not presented evidence that establishes that members of the Kasich Campaign were state actors here.

b. The Libertarian Party Has Not Demonstrated That Casey Engaged in State Action

The Libertarian Party contends that Casey “was a state official” as a member of “Ohio’s Personnel Board of Review.” Appellant Br. at 36. However, “not every action undertaken by a person who happens to be a state actor is attributable to the state.” *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001). “For the purposes of a state-action analysis, there can be no pretense of acting under color of state law if the challenged conduct is not related in some meaningful way either to the actor’s governmental status or to the performance of his duties.” *Id.* The Libertarian Party acknowledges that Casey’s petition-protest involvement was not within the scope of Casey’s duties as a member of Ohio’s Board of Personnel Review; the Libertarian Party contends, however, that Casey’s actions nonetheless constitute state action taken under color of state law because Casey’s job “carried a large measure of cachet with [the Ohio Republican Party], the Kasich Campaign, Damschroder, and others,” and thus Casey “was able to do what ordinary citizens cannot” in coordinating Felsoci’s challenge of Earl. Appellant Br. at 37.

The record does not support the Libertarian Party's argument. The communications that the Libertarian Party identifies were sent by Casey from his personal email address and they do not contain any reference, either implicitly or explicitly, to Casey's state-government role. Casey undoubtedly spent a great deal of time in coordinating Felsoci's protest, but he did so through speaking to attorneys, exploring election laws, and reviewing public records obtained via public-record requests. Damschroder testified that he provided Casey with the same information that he would have provided to any other individual that asked him. *See* R. 247 (9/29/14 H'rg Tr. Vol. 1 at 187) (Page ID #6673). The record accordingly demonstrates that Casey was acting out of his "private interest[]" in protesting Earl, and that Casey "would have been in the same position [to coordinate Felsoci's protest of Earl] even if he had not been a" member of Ohio's Board of Personnel Review. *Waters*, 242 F.3d at 359. Casey did not act under color of state law here for purposes of § 1983.

c. The Libertarian Party Has Not Demonstrated that Damschroder Was Involved in a Civil Conspiracy

Finally, the Libertarian Party contends that, even though Casey and the Ohio Republican Party may not be state actors here themselves, these actors conspired with election officials within the Secretary of State's office such as Damschroder, and thus they are state actors for purposes of § 1983. "Private persons may be

held liable under § 1983 if they willfully participate in joint action with state agents.” *Memphis, Tenn. Area Local v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004). In order to establish a civil conspiracy, the plaintiff must show:

[A]n agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

Id. (quoting *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985)). The Libertarian Party has not established here that Damschroder was involved in a conspiracy with Casey and the Ohio Republican Party.

The Libertarian Party cites communications between Damschroder, Casey, and other members of the Ohio Republican Party in which Casey and others asked Damschroder for information on candidate petitions and protest filings. *See, e.g.*, R. 227-1 (8/26/14 Damschroder Dep. at 305-09 (Ex. 16)) (Page ID #5524-28). As discussed above, however, Damschroder testified that in his role at the Secretary of State’s office, it was “not uncommon for [him] to get questions from all kinds of people affiliated with parties, not affiliated

with parties, candidates, whomever,” and that Damschroder would “give them the information if [he had] it.” R. 247 (9/29/14 H’rg Tr. Vol. 1 at 187) (Page ID #6673). Damschroder had known Casey for a long time, Damschroder knew that Casey was “a political gadfly,” and Damschroder would frequently answer Casey’s questions. *Id.* at 186 (Page ID #6672). The Libertarian Party has not identified anything in the record that indicates that Damschroder gave information to Casey that he would not have given to anyone else, or that Damschroder told Casey anything that was improper. Accordingly, these communications do not establish that Damschroder “shared in the general conspiratorial objective” to remove Earl, *see Memphis, Tenn. Area Local*, 361 F.3d at 905, by responding to questions from Casey and other members of the Ohio Republican Party.

The Libertarian Party emphasizes the fact that Damschroder knew ahead of time that a protest would be filed against Earl, and that Damschroder instructed his staff to accept protests that were filed after 4 PM. Appellant Br. at 19. The Libertarian Party states that this establishes that Damschroder knew to expect a protest from Felsoci on the day of the protest deadline, and that Damschroder wanted his office to “accept the protest even if filed late.” *Id.* at 40. Damschroder testified, however, that he instructed his staff to accept all late protests for filing purposes “so [that] a determination could be made whether it’s timely or not” and that “unless [he has] been instructed to not accept something that comes in, then we would accept it.” R. 227-1

(8/26/14 Damschroder Dep. at 80) (Page ID #5299); *see also id.* at 78 (Page ID #5297). The Libertarian Party has not provided any evidence that establishes that Damschroder instructed his staff to accept late protest filings for the purpose of the conspiracy, or that Damschroder intended to approve of Felsoci's protest even if it were filed late (which it was not).

The Libertarian Party further claims that Damschroder was involved in "hav[ing] the hearing officer (Smith) change his mind" about the outcome of the case. Appellant Br. at 40. This argument relates to documents that show that Smith initially intended to rule in favor of the Libertarian Party in interpreting Ohio's employer-information law. *See* R. 252 (10/01/14 H'rg Tr. Vol. 2 at 233) (Page ID #6730). Smith's final recommendation came out the other way, however, after Smith reevaluated his interpretation of an Ohio state-court decision. *Id.* at 236 (Page ID #6733). The Libertarian Party cites a phone call between Smith and Jack Christopher, general counsel for Secretary Husted, who called Smith from Damschroder's office before Smith altered his decision. *Id.* at 244 (Page ID #6741). Smith testified that he did "not recall any particular conversation" with Christopher, but that he and Christopher "did not have a substantive discussion" of the cases. *Id.* at 244-45 (Page ID #6741-42). Christopher did send Smith an email discussing Christopher's legal interpretation of the Ohio decision at issue, but Smith testified that "by that point in time . . . I had already decided that I was going to have to be rewriting the report." *Id.* at 254-55 (Page ID #6751-52). Smith

testified that no one at the Secretary's Office tried to "tell [him] how to decide th[e] case" and that no one at the Secretary's Office attempted to influence his decision. *Id.* at 253 (Page ID #6750). To the contrary, Smith remarked on the "scrupulosity of the folks in the Secretary of State's Office." *Id.* The record does not demonstrate beyond speculation that Damschroder or his co-workers exerted any improper influence on Smith, or that Smith changed his recommendation as a result of the acknowledged conversations that he had with Christopher while Smith was reaching his final determination.

The Libertarian Party cites two additional pieces of evidence to establish that Damschroder was involved in a conspiracy to remove Earl from the ballot. First, the Libertarian Party states that Damschroder "cheer[ed] with Christopher for Zeiger at the [] administrative hearing" and that this demonstrates that Damschroder "shared the general conspiratorial objective." Appellant Br. at 42. This argument refers to text messages exchanged between Damschroder and Christopher during the administrative hearing before Smith. Referring to Zeiger's advocacy during the hearing, Christopher told Damschroder "Zeiger just won't bend, will he?!" and Damschroder responded "I like unbending." R. 227-1 (8/26/14 Damschroder Dep. at 319 Ex. 16) (Page ID #5538). Christopher also stated "I hope nobody asks Zeiger who is paying them to do this!! ;)." *Id.* at 321 (Page ID #5540). Damschroder responded, "It's a pretty penny I'm sure." *Id.* Damschroder testified that he was impressed by Zeiger's

advocacy during the hearing and that he was remarking on the likely cost of Zeiger's fees, given that he knew that Zeiger was an experienced attorney. R. 247 (9/29/14 H'rg Tr. Vol. 1 at 161-62) (Page ID #6647-48). This "cheer[ing]" does not establish Damschroder's involvement or actions in a conspiracy to remove Earl from the ballot.

Lastly, the Libertarian Party states that Damschroder's investigation of petition circulator Hatchett demonstrates that Damschroder was involved in the conspiracy. Appellant Br. at 40. According to the Libertarian Party, "Casey asked Damschroder to investigate Hatchett," and Brandi Seskes in the Secretary of State's office performed this investigation. *Id.* at 20. This is not supported by the record. The portion of Casey's testimony which the Libertarian Party cites states only that Casey may have asked Damschroder "the question of whether there was anything statutorily that prohibited a registered sex offender from being a circulator of petitions." R. 241-1 (8/28/14 Casey Dep. at 53) (Page ID #6260). Seskes did Google Hatchett's name in order to find out his criminal background after Felsoci submitted his protest, R. 221-1 (Seskes Dep. at 14, 22) (Page ID #4820, 4828), but Seskes testified that no one in the Secretary of State's office asked her to do so. *Id.* at 14-15 (Page ID #4820-21). Seskes testified that she did so out of "[c]uriosity. Trying to get a handle on who the players were and what was going on." *Id.* at 15 (Page ID #4821).

In sum, the Libertarian Party has not presented evidence here to establish that Damschroder or anyone

in the Secretary of State’s Office shared in a conspiratorial objective with Casey and the Ohio Republican Party, or that Damschroder committed any act in furtherance of this conspiracy. Because Casey and the Ohio Republican Party are not state actors here, the Libertarian Party has failed to establish state action. The district court did not err in granting summary judgment to defendants on the selective-enforcement claim.

3. Equal Protection Clause Claim

The Libertarian Party also asserts that SB 193 violates the Equal Protection Clause. We evaluate this claim under the framework established by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). See *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012). “Under the *Anderson-Burdick* test, the court must first ‘consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.’” *Hargett*, 791 F.3d at 693 (quoting *Anderson*, 460 U.S. at 789). Second, the court “must ‘identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.’” *Id.* (quoting *Anderson*, 460 U.S. at 789). Lastly, the court “must ‘determine the legitimacy and strength of each of those interests’ and ‘consider the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Id.* (quoting *Anderson*, 460 U.S. at 789).

The severity of the burden imposed on an individual by the state’s election law determines the level of scrutiny that we apply and thus the degree to which the state must justify its regulations. *See Burdick*, 504 U.S. at 434. If a state’s law imposes “severe” burdens on the plaintiff’s constitutional rights, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). By contrast, if the state law imposes “‘reasonable’ and ‘nondiscriminatory’” burdens, “the statute will be subject to rational basis [review].” *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015) (quoting *Burdick*, 504 U.S. at 434). “If the burden lies somewhere in between, courts will weigh the burden on the plaintiffs against the state’s asserted interest and chosen means of pursuing it.” *Id.* (internal quotation marks omitted).

a. Burden on LPO

Our analysis thus begins by assessing the “character and magnitude of the asserted injury” that the Libertarian Party alleges. *Anderson*, 460 U.S. at 789. In evaluating the burden imposed by an election law, we must consider “the combined effect of the applicable election regulations,” not simply each law in isolation. *Blackwell*, 462 F.3d at 586. “In determining the magnitude of the burden imposed by a state’s election laws, the Supreme Court has looked to the associational rights at issue, including whether alternative means are available to exercise those rights; the effect of the

regulations on the voters, the parties and the candidates; evidence of the real impact the restriction has on the process; and the interests of the state relative to the scope of the election.” *Id.* at 587. We keep these factors in mind as we turn to the Libertarian Party’s claims.

Ballot-access laws such as SB 193 “place burdens on two different, although overlapping, kinds of rights – the rights of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Id.* at 585 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). The Libertarian Party contends that these rights are burdened because SB 193 “den[ies] minor parties primaries,” “the only mechanism available for officially registering members” under Ohio law. Appellant Br. at 41. The Libertarian Party does not contest the number of signatures required by SB 193 to form a minor political party or nominate a candidate, nor does the Libertarian Party argue that SB 193’s petition deadlines violate the First Amendment. Accordingly, our decision is limited to the aspect of SB 193 that LPO addresses – its requirement that minor political parties such as the Libertarian Party proceed outside of Ohio’s primary framework – and we do not address the constitutionality of the provisions of SB 193 that are not presented in this appeal.

To best understand the Libertarian Party’s asserted burden, we briefly recount the ballot-access framework established by SB 193. As discussed above, SB 193 creates two methods by which a political party

may obtain state recognition as a “[m]inor political party” and thereby access the ballot: the party may meet a three-percent-vote requirement in the immediately preceding election, or the party may form via petition. Ohio Rev. Code § 3501.01(F)(2). A minor party that forms by petition – either a party that did not meet the three-percent-vote threshold in the last election or a newly created party that did not participate in the last election – must nominate their candidates to appear in the general election by filing a nominating petition, rather than by participating in the Ohio primary. § 3517.012. This nominating petition must be filed at least 110 days before the general election. § 3517.012(B)(1). If the candidate is running for statewide office, the candidate must obtain the signatures of “at least fifty qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years.” § 3517.012(B)(2)(a).

Major political parties, by contrast, nominate candidates for the general election through a primary election, as do minor parties that achieved the requisite three-percent-vote threshold in the prior election. *See* § 3513.05. In order to appear on the primary ballot, a major-party candidate for statewide office must submit a petition containing signatures from “at least one thousand qualified electors who are members of the same political party as the candidate.” *Id.* Minor-party candidates appearing in the primary election need only half of that number. *Id.*

Because the Libertarian Party has to form by petition, and because it accordingly has to nominate its candidates via petition, SB 193 excludes the Libertarian Party from the primary, at least until it meets the three-percent-vote requirement in an election. *See* Appellant Br. at 41. The Libertarian Party acknowledges that the Constitution does not guarantee a party a right to nominate candidates by primary, as opposed to other means. Reply Br. at 23. The Supreme Court established this principle in *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), where the Court refused to invalidate a statute that required “small parties [to] proceed by convention when major parties [could] choose their candidates by primary election.” The Court explained that “[t]he procedures are different, but the Equal Protection Clause does not necessarily forbid the one in preference to the other.” *Id.* at 781-82. The Libertarian Party contends, however, that although it does not have a constitutional right to a primary, excluding it from the primary process violates the Equal Protection Clause because the primary system in Ohio grants a benefit to major parties that is denied to minor parties. According to the Libertarian Party, “Ohio officially registers voters’ political affiliations through primaries” and, in the absence of a primary, individuals cannot affiliate with the Libertarian Party and the Party is deprived of the political advantages of party membership that primary-participating parties enjoy. Appellant Br. at 41-42.

The Libertarian Party misstates Ohio law. Ohio operates a version of a “closed” primary system, *see*

California Democratic Party v. Jones, 530 U.S. 567, 570 (2000), in that Ohio places some limits on an individual’s ability to vote in a party’s primary or sign a party’s nominating petition if an individual is not a “member” of that political party. *See, e.g.*, Ohio Rev. Code §§ 3513.05 & 3513.19(A)(3). Ohioans do not affiliate with a party upon registering to vote. Rather, for the purpose of designating who can vote in a primary or to sign a nominating petition, Ohio law defines party membership by an individual’s primary-voting record. Specifically, for major parties nominating their candidates by primary, Ohio law provides that “[f]or purposes of signing or circulating a petition of candidacy for party nomination or election, an elector is considered to be a member of a political party if the elector voted in that party’s primary election within the preceding two calendar years, or if the elector did not vote in any other party’s primary election within the preceding two calendar years.” § 3513.05. Similarly, an individual’s eligibility to vote in a primary election may be challenged on the basis of that individual not being a “member of the political party whose ballot the person desires to vote,” where “membership” is defined by the same two-calendar year metric. § 3513.19(A)(3); *see also* § 3513.20.² If “the right of a person to vote” in a party primary “is challenged upon the ground” that the

² Notably, in the first primary in which the new political party participates – a party that has met the three-percent-vote threshold in a prior election – “any qualified elector who desires to vote the new party primary ballot . . . shall be allowed to vote the new party primary ballot regardless of prior political party affiliation.” Ohio Rev. Code § 3517.016.

person is not a party member, “membership in or political affiliation with a political party shall be determined by the person’s statement, made under penalty of election falsification, that the person desires to be affiliated with” the “party whose primary ballot the person desires to vote.” § 3513.19(B).

As the State of Ohio and Secretary Husted argue, “[t]hese statutes do not govern party registration or affiliation *in general*,” but rather refer only to “party affiliation” for a specific purpose: establishing who may vote in a partisan primary. Husted Appellee Br. at 36. Ohio insists that SB 193 places no restrictions on the Libertarian Party’s ability, as a private entity, to define its membership.

The Libertarian Party emphasizes the enormous significance to political parties of having a membership, including a party member’s ability to “develop” the party, recruit additional members, contribute money, and more. Appellant Br. at 42. The fundamental importance of these activities is beyond dispute. But the Libertarian Party has not explained how Ohio’s definition of “member of a political party” for the limited purpose discussed above, *see* Ohio Rev. Code § 3513.05, restricts the Party’s ability to have members that perform these core political activities.

We are aware that, as the Libertarian Party asserts, there are some “legal ramifications” to requesting a party’s ballot in a primary election, Appellant Br. at 42, because Ohio operates a primary system that is “closed” to non-party members to some degree. As

discussed above, for example, an individual who affiliates with a party in a primary election may not vote for a different party's candidate for a period of two years. If challenged on this basis, however, the voter may provide a statement declaring an intention to affiliate with and support the principles of a different party. Ohio Rev. Code § 3513.19(B). According to the Libertarian Party, Ohio law does not provide it with a base of people that are "wedded" to it in a similar way. Reply Br. at 22-23.

The Libertarian Party has not articulated, however, how this framework burdens its ability to recruit members, access the general-election ballot, or engage in other modes of political affiliation and expression, nor has the Libertarian Party explained how this places minor parties at a disadvantage relative to major parties. It is true that, in order to place a candidate on the ballot, the Libertarian Party must obtain the signatures of at least "fifty qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years." § 3517.012(B)(2)(a). But the Libertarian Party does not contend that the number of signatures required is unduly burdensome. Moreover, as Secretary Husted and the State of Ohio assert, only approximately 1.3 million Ohioans cast primary ballots in 2014, out of over 7.7 million registered voters. Husted Appellee Br. at 38-39. This leaves at least "83 percent of all registered voters" in Ohio unaffiliated and "able to sign petitions for" other candidates. *Id.* The Libertarian Party has not

demonstrated that this aspect of SB 193 imposes a severe burden.

Finally, the Libertarian Party cites *Green Party of Michigan v. Land*, 541 F. Supp. 2d 912 (E.D. Mich. 2008), in support of its argument that the denial of a primary process to minor parties imposes a severe burden. The district court in *Land* considered a Michigan statute that provided certain voter information exclusively to the two major parties participating in the primary election. *Land*, 541 F. Supp. 2d at 914. The Michigan primary was restricted to parties that “received more than 20% of the total presidential vote cast in Michigan in the last presidential election,” and thus “only the Democratic and Republican parties were eligible to participate.” *Id.* Primary voters indicated their party preference at the primary election, and because this information was not recorded at the time of registration, “the party preference designations from the primary election are the best source of information about the party affiliation of a large group of Michigan voters.” *Id.* Michigan law directed that voter information be kept confidential and exempt from disclosure “to any person for any reason.” *Id.* Nonetheless, the statute required the Michigan Secretary of State “to provide these records” to political parties participating in the primary: the Democratic and Republican parties. *Id.* The district court recognized that minor parties could benefit from the party-preference information of voters that voted in the primary, such as by using it to “direct [their] campaign efforts . . . to voters who are more likely to be responsive to [their] issue

positions and candidates.” *Id.* at 919. By prohibiting minor parties from accessing this information given exclusively to major parties, the Michigan statute severely burdened minor parties’ associational rights. *Id.* at 919-20.

Land is meaningfully different from the situation here. The minor parties in *Land* wanted access to the party-preference information of *individuals who participated in the primary*; they did not seek to participate in the primary or have the affiliation of their party members registered at the primary. The harm in *Land* was that minor parties had “no other way to obtain the party preference information” that was given to major parties exclusively. *Id.* at 923. The Libertarian Party has not identified any provision of Ohio law that provides information on a differential basis to major and minor parties. The Libertarian Party’s argument based on *Land* is not persuasive.

Because the Libertarian Party has not demonstrated that Ohio law deprives it of membership or affiliation in a general sense, and because the Libertarian Party does not challenge any other aspect of SB 193’s requirements on appeal, we conclude that the Libertarian Party is not severely burdened by SB 193’s requirement that it select candidates for the general-election ballot via petition, rather than by primary. Nonetheless, as discussed above, affiliating with a party at a primary does have some “legal ramifications,” and so SB 193’s burdens, although not severe, are also not non-existent. Moreover, we also acknowledge that, because Ohio law allows voters to

become a “member” of a party under Ohio law by casting a party ballot during a primary, there may be some expressionist value to voting in a partisan primary and thus “affiliating” with a party, even if this does not mean membership or affiliation in a general sense. We will thus turn to consider the state’s asserted interests, and balance the strength of this interest against the burdens that we have identified.

b. Ohio’s Asserted Interest

Secretary Husted and the State of Ohio argue that SB 193’s requirements relate to its interest in “ensur[ing] that new or minor parties ‘have a significant modicum of support’ before they appear on the ballot.” Husted Appellee Br. at 44 (quoting *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971)). The Supreme Court has long recognized this state interest as “important.” *Jenness*, 403 U.S. at 442. According to Ohio, the state “had to make a choice” in pursuing this state interest following our decision in *Blackwell*. R. 185 (Intervenor Def. Cross Mot. for Summ. J. at 6) (Page ID #3613); *see also* Husted Appellee Br. at 44.

In *Blackwell*, we found that Ohio’s requirement that a minor party file its registration petition 120 days in advance of the primary election – an election in which minor-party candidates had to participate in order to appear on the general-election ballot – imposed a severe burden on minor parties because the parties needed to gather “more than thirty thousand” signatures “more than one year in advance of the

[general] election,” “a time when the major party candidates are not known and when the populace is not politically energized.” *Blackwell*, 462 F.3d at 586. In the face of this severe burden, we indicated that Ohio had failed to advance a significant state interest in its primary and early-filing requirement, indicating that “[f]orty-eight states have filing deadlines for minor parties later in the election cycle, and forty-three states allow minor parties to nominate candidates in a manner other than the primary election.” *Blackwell*, 462 F.3d at 594.

Ohio claims that SB 193 is an attempt to comply with *Blackwell* while also ensuring that minor parties garner a sufficient amount of support prior to appearing on the general-election ballot. See R. 185 (Intervenor Def. Cross Mot. for Summ. J. at 6) (Page ID #2613); Husted Appellee Br. at 44. According to Ohio, in the face of *Blackwell*, it chose to eliminate its primary requirement for newly established parties and instead require that “only established political parties . . . hold primaries, while allowing new political parties to determine their nominees through” petition. R. 185 (Intervenor Def. Cross Mot. for Summ. J. at 6) (Page ID #2613). By eliminating the primary requirement, Ohio now requires that minor-party candidates file paperwork 110 days before the general election, rather than over a year in advance. Ohio Rev. Code § 3517.012(B)(1).

As discussed above, the Libertarian Party does not argue on appeal that a filing requirement 110 days prior to the general election is unduly burdensome,

and we accordingly do not decide this issue. We do, however, credit Ohio's interest in having minor parties garner "a significant modicum of support," *Jenness*, 403 U.S. at 442, and Ohio's rationale for having minor parties "nominate candidates in a manner other than the primary election," *Blackwell*, 462 F.3d at 594, in order to align better its ballot-access laws with our decision in *Blackwell*.

c. Weighing LPO's Burden Against Ohio's Interest

Having determined the burden that SB 193 places on the Libertarian Party in deterring it from nominating candidates by primary, and having addressed the state's interest for the law, we now consider the extent to which the state's asserted interests "make it necessary to burden the plaintiff's rights" and whether the weight of the state's interest is sufficient to justify the magnitude of the burden imposed. *Anderson*, 460 U.S. at 789. As discussed above, the Libertarian Party has not demonstrated that the aspect of SB 193 that it challenges poses a severe burden on its First or Fourteenth Amendment rights. At the same time, the state has articulated a legitimate interest in its law, and this interest is sufficient in light of the Libertarian Party's claimed burdens. In so deciding, we echo our statement from an earlier decision in this same dispute: "[w]e note that the LPO has struggled to become and remain a ballot-qualified party in Ohio, and we acknowledge that this decision entails that their efforts must continue still[, b]ut we also note that we decide one case

at a time.” *Libertarian Party of Ohio*, 751 F.3d at 424. On the basis of this record and challenge before us, we agree with the district court that summary judgment is appropriate in favor of the State of Ohio and Secretary Husted on the Equal Protection challenge to SB 193.

B. LPO’s State Constitutional Challenge

Lastly, the Libertarian Party contends that the district court erred in dismissing its state-constitutional claim. Article V, § 7 of the Ohio Constitution provides that “[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law. . . .” Ohio Const. art. V, § 7. The Libertarian Party alleged that SB 193 was in conflict with this provision, but the district court dismissed this claim as barred by the Eleventh Amendment of the U.S. Constitution. R. 336 (10/14/15 D. Ct. Op. at 19) (Page ID #8705).

Whether or not the district court was correct, an Ohio state court has already decided the Libertarian Party’s state-constitutional issue. “Pursuant to the doctrine of res judicata, ‘a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.’” *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir. 2009) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). “[T]he law is well-settled that federal courts must give prior state court judgments the same preclusive effect they would have in the courts of that state.” *Leshner v. Lavrich*, 784

F.2d 193, 195 (6th Cir. 1986). Secretary Husted and the State of Ohio argue that the Libertarian Party's claim under Article V, § 7 of the Ohio Constitution is barred because the Libertarian Party "litigated that claim to final judgment in Ohio state court" after the district court dismissed the claim. Husted Appellee Br. at 50. Specifically, the Franklin County Court of Common Pleas granted summary judgment to Secretary Husted and Ohio Attorney General Mike DeWine, holding on June 7, 2016, that S.B. 193 does not violate Article V, § 7 of the Ohio Constitution. *Libertarian Party of Ohio v. Husted*, No. 16CV554 (Franklin Cty. Ct. Common Pleas June 7, 2016); Appellant Addendum 3.

The Libertarian Party advances two arguments for why we should not decide that its state-constitutional claim is barred by res judicata. First, the Libertarian Party contends that the state court's judgment is not final. Reply Br. at 25. According to the Libertarian Party, it filed a motion for a new trial and for relief from judgment under Rules 59 and 60 of the Ohio Rules of Civil Procedure and, after the state court did not rule on that motion, it filed an appeal in state court on July 6, 2016. Reply Br. at 24-25. The Libertarian Party asserts that because the Rule 59 motion has been stayed in state court and because the state-court decision may be reversed, res judicata does not apply to the Franklin County Common Pleas court's decision. This is not persuasive. A motion for a new trial does not alter the preclusive nature of an otherwise final judgment. Restatement (Second) of Judgments § 13 cmt. f ("A judgment otherwise final for purposes of the

law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like; nor does the fact that a party has made such a motion render the judgment nonfinal.”). And under Ohio law, “[t]he pendency of an appeal . . . does not prohibit application of claim preclusion. The prior state court judgment remains ‘final’ for preclusion purposes, unless or until overturned by the appellate court.” *United States ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 415 (6th Cir. 2016) (internal quotation marks omitted) (citing *Cully v. Lutheran Med. Ctr.*, 523 N.E.2d 531, 532 (Ohio Ct. App. 1987)). The state-court decision is final here for purposes of res judicata.

Second, the Libertarian Party argues that we should not decide this issue of the preclusive effect of the state-court judgment because Secretary Husted and the State of Ohio raised this issue for the first time on this appeal. Reply Br. at 26. Instead, “res judicata should be left to the District Court on remand (if necessary).” Reply Br. at 26. As the Libertarian Party recognizes, our cases acknowledge that there are circumstances where res judicata may be appropriately entertained for the first time on appeal. *Leshner*, 784 F.2d at 195. Here, the Libertarian Party filed its claim in state court on January 19, 2016, *see Husted*, No. 16CV554, at 1, after the district court dismissed the Party’s state-law Article V, § 7 claim on October 14, 2015 on the basis of Eleventh Amendment immunity. R. 336 (10/14/15 D. Ct. Op. at 19) (Page ID #8705).

Accordingly, the state-court judgment did not become preclusive until after the district court dismissed the claim, and thus there was no opportunity for a res judicata defense to be presented to the district court. Under these circumstances, it is appropriate to consider res judicata for the first time on appeal. *See Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 418-19 (6th Cir. 2012) (“[T]he defense of res judicata was not available before the district court because the [state-court class-action] settlement had neither been certified nor made final by the Arkansas Supreme Court. Now that the state decision has become final, it is appropriate for this Court to respect its conclusions.” (internal quotations and citations omitted)). We do not believe that “[t]he better course here is to leave res judicata to the District Court on remand.” Reply Br. at 27. Our consideration of this preclusion argument “requires us to consider a purely legal issue that is presented ‘with sufficient clarity and completeness’ in the parties’ briefs.” *Gooch*, 672 F.3d at 419 (internal quotation marks omitted). Because the Ohio state court reached a final judgment on the Libertarian Party’s state-law Article V, § 7 claim, the Libertarian Party is precluded from pursuing this claim further in this court.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**Libertarian Party
of Ohio, *et al.*,**

Plaintiffs,

v.

**Jon A. Husted, Ohio
Secretary of State,**

Defendant.

Case No. 2:13-cv-953

Judge Michael H. Watson

OPINION AND ORDER

(Filed Oct. 14, 2015)

Plaintiffs challenge several provisions of Ohio's election statutes, including Ohio Revised Code §§ 3503.06(C)(1)(a) and 3501.38(E)(1) and Ohio Senate Bill 193 ("S.B. 193"). The Court has issued several comprehensive decisions on the constitutional issues this case has presented. ECF Nos. 18, 47, 80, 260, & 285. The remaining issues not addressed in those decisions are: (1) whether S.B. 193 violates the United States Constitution as applied to Plaintiffs, *see* Pls' Am. Compl. 341-46, ECF No. 188 (Count 4); and (2) whether the State of Ohio is immune from Plaintiffs' claim that S.B. 193 violates the Ohio Constitution, *see id.* ¶¶ 347-54 (Count 5).

Motions addressing these remaining issues are ripe for review. *See* ECF Nos. 205, 261, 264, & 267. These motions also seek the Court's final consideration

of Plaintiffs' other claims. *See* Pls' Am. Compl. ¶¶ 329-340, 355-79 (Counts 1-3 and 6-9).

For the reasons addressed herein, the Court finds that S.B. 193 is not unconstitutional as applied to Plaintiffs and that the State of Ohio is immune from Plaintiffs' claim that S.B. 193 violates the Ohio Constitution.

I. BACKGROUND

A. The Parties

Four Plaintiffs initiated this case: the Libertarian Party of Ohio ("LPO"), Kevin Knedler ("Knedler"), Aaron Harris ("Harris"), and Charlie Earl ("Earl") (collectively, "the LPO candidates"). LPO has previously been a ballot-qualified political party in Ohio. The LPO candidates have run for local, statewide, and federal offices since 2008 and are active members of LPO.

During a conference held on December 4, 2013, the Court orally granted the following additional parties leave to intervene as Plaintiffs in this action: Robert M. Hart, individually; Robert Fittrakis, on behalf of the Ohio Green Party; Max Russell Erwin, individually; and Don Shrader, on behalf of the Constitution Party of Ohio (collectively, "Intervenor Plaintiffs"). Intervenor Plaintiffs no longer have any pending claims in this case. *See* ECF No. 285 (denying with prejudice Intervenor Plaintiffs' claim challenging S.B. 193 on its face).

Defendant Jon Husted, the Ohio Secretary of State (“Secretary Husted”), is Ohio’s chief elections officer under Ohio Revised Code § 3501.04 and therefore is charged with the duty to enforce Ohio’s election laws. Plaintiffs sue Secretary Husted in his official capacity only. The State of Ohio successfully moved to intervene to defend the constitutionality of Ohio’s out-of-state circulator law, Ohio Revised Code § 3503.06(C)(1)(a) on October 3, 2013.

Defendant Gregory Felsoci (“Felsoci”) filed one of the successful protests against the 2014 LPO candidates with Secretary Husted that resulted in the removal of those candidates from the Ohio May 2014 primary ballot. The Court likewise granted Felsoci leave to intervene.

B. Facts and Procedural History

The present lawsuit is one of four actions Plaintiffs have filed in federal court over the past decade concerning their right to appear on the Ohio ballot. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006) (striking down the cumulative effect of Ohio election laws on minor party ballot access); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1015 (S.D. Ohio July 17, 2008) (resulting in the LPO candidate’s access to the ballot because it had the requisite community support); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722, 2011 WL 3957259, at *6 (S.D. Ohio Sept. 7, 2011) (finding H.B. 194 violated

LPO's First Amendment rights), *vacated as moot*, 497 F. App'x 581 (6th Cir. 2012).

Plaintiffs initiated this lawsuit on September 25, 2013 – alleging the first of Plaintiffs' claims against Secretary Husted (Counts 1 and 2) – to challenge Ohio Revised Code § 3506.06(C)(1)(a), Ohio's prohibition against using petition circulators who reside in states other than Ohio. On September 20, 2013, a related case, *Citizens in Charge, Inc., et al v. Husted*, Case No. 2:13-cv-935, brought by similarly-situated plaintiffs, challenged the same statute. Both cases were before this Court. Both sets of plaintiffs successfully sought a preliminary injunction to prohibit the enforcement of the statute. *See* Order, ECF No. 18. The Court has since permanently enjoined Secretary Husted and the State of Ohio from enforcing that statute in *Citizens in Charge, Inc v. Husted*. Order, ECF No. 43, Case No. 2:13-cv-935.

On November 6, 2013, the Ohio Legislature passed, and the Governor signed, S.B. 193, which became effective February 5, 2014. Thereafter, Plaintiffs amended their complaint, adding three claims (Counts 3, 4, and 5) seeking to enjoin the retroactive enforcement of S.B. 193 and bringing as-applied challenges to S.B. 193 under the United States and Ohio Constitutions. *See* ECF No. 16.

Plaintiffs successfully sought a preliminary injunction in this Court preventing Secretary Husted and the State of Ohio from retroactively enforcing S.B. 193. As a result, the Court ordered Secretary Husted

and the State of Ohio to provide Plaintiffs access to the primary and general election ballots in 2014.

In anticipation of the 2014 primary, LPO hired Oscar Hatchett (“Hatchett”) (a paid circulator service) to collect signatures for the LPO candidates’ petitions. Hatchett collected signatures for several LPO candidates, specifically Earl for Governor, his running mate Sherry L. Clark (“Clark”) for Lieutenant Governor, and Steven Linnabary (“Linnabary”) for Ohio Attorney General. The petition forms (“part petitions”) contained over 1,400 signatures but did not include the name and address of the person or entity that paid them in the employer information block. Another paid circulator, Sarah Hart (“Hart”), collected signatures and failed to fill out the employer information block as well. After submitting the part petitions, Secretary Husted certified Earl, Clark, and Linnabary as LPO candidates for the 2014 Ohio primary election.

The part petitions were challenged by Felsoci and two others as violating Ohio Revised Code § 3501.38(E)(1), which requires paid circulators to disclose their employers. After filing the protests, Secretary Husted referred them to an appointed hearing officer, Professor Bradley A. Smith (“Professor Smith”) to conduct a hearing and issue a report and recommendation as to disposition of the protests.

On March 7, 2014, Professor Smith found that the signatures Hatchett and Hart gathered violated Ohio Revised Code § 3501.38(E)(1) because they failed to provide the name and address of the person or entity

who paid them in the employer information box. Professor Smith therefore recommended that the part petitions containing those signatures be ruled invalid.

Secretary Husted adopted Professor Smith's report and recommendation the same day. ECF No. 57-4. As a result of the invalidation of the part petitions gathered by Hatchett and Hart, the LPO candidates no longer had the requisite number of valid signatures to appear on the May 2014 Ohio primary ballot. Having failed to qualify for the primary ballot, Earl, Clark, and Linnabary did not appear on the ballot as LPO candidates for the November 2014 Ohio general election.

Shortly thereafter, Plaintiffs again amended their complaint, adding additional claims (Counts 6, 7 and 8) challenging the disclosure requirement of Ohio Revised Code § 3501.38(E)(1). ECF No. 56. Felsoci intervened. *See* ECF No. 58.

That same day and in a renewed motion on September 15, 2014, Plaintiffs sought to preliminary enjoin the enforcement of Ohio Revised Code § 3501.38(E)(1). ECF Nos. 57 & 192. Plaintiffs' September 15, 2015 motion also sought preliminary injunctive relief on the final count (Count 9) included in their third amended complaint, ECF No. 188, which alleges Professor Smith held a conflict of interest because he represented the Ohio Attorney General, Mike Dewine, in a separate case.

The Court, however, denied Plaintiffs' motions. The Court declined to grant the injunction and determined that Ohio Revised Code § 3501.38(E)(1) places

only a minimal burden on political speech and that the disclosures it requires are substantially related to Ohio's interests in both deterring and detecting fraud. *See* ECF Nos. 80 & 260. The Court also determined that Secretary Husted's decision to void the LPO petitions was not influenced or controlled by improper political animus. *See id.*

Plaintiffs' third amended complaint contains the current iteration of allegations against Defendant and Intervenor Defendants. ECF No. 188.

II. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265 (6th Cir. 2007).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing there is a genuine issue of material fact for trial, and the Court must refrain from making

credibility determinations or weighing the evidence. *Pittman v. Cuyahoga Cnty. Dept. of Children and Family Serv.*, 640 F.3d 716, 723 (6th Cir. 2011). Summary judgment will not lie if the dispute about a material fact is genuine, “that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009).

Thus, the central issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Pittman*, 640 F.3d at 723 (quoting *Anderson*, 477 U.S. at 251-52).

III. ANALYSIS

A. Counts 1 and 2

Plaintiffs move for summary judgment as to Counts 1 and 2, which challenge Ohio’s prohibition against using petition circulators who reside in states other than Ohio (Ohio Revised Code § 3506.06(C)(1)(a)). ECF No. 261.

The Court has already permanently enjoined Secretary Husted and the State of Ohio from enforcing the residency requirement for circulators of petitions for candidates and initiatives set forth in Ohio Revised Code § 3503.06(C)(1)(a). *See* ECF No. 43, Case No. 2:13-cv-935. The Court notes that an appeal is pending

in that case, Case No. 2:13-cv-935; however, that appeal is limited and does not include an appeal of the Court's injunction permanently prohibiting the enforcement of Ohio Revised Code § 3503.06(C)(1)(a). Notice of Appeal 1, ECF No. 45, Case No. 2:13-cv-935. Nothing has changed in the interim.

On the basis of its prior ruling, the Court **GRANTS** Plaintiffs' motion for summary judgment on Counts 1 and 2 and **DENIES** Secretary Husted's and the State of Ohio's motion for summary judgment as to Counts 1 and 2. Accordingly, for the reasons outlined in the permanent injunction order, ECF No. 43, Case No. 2:13-cv-935, the Court finds Ohio Revised Code § 3503.06(C)(1)(a) violates Plaintiffs' First Amendment right to engage in free speech, and **PERMANENTLY ENJOINS** Secretary Husted and the State of Ohio from enforcing the residency requirement for circulators of petitions for candidates and initiatives set forth in Ohio Revised Code § 3503.06(C)(1)(a).

B. Count 3

Count 3 asserts a claim under 42 U.S.C. § 1983 challenging the retroactive application of S.B. 193. The Court issued a preliminary injunction on this issue on January 7, 2014, enjoining Secretary Husted and the State of Ohio from enforcing S.B. 193 until after the 2014 election cycle. *See* ECF No. 47.

In the State of Ohio's cross motion for summary judgment, ECF No. 267, it argues that Plaintiffs' claim is moot because it challenges the law as applied to

Ohio's 2014 primary elections, and Plaintiffs participated in that election, which is now over. Mot. Summ. J. 3-5, ECF No. 267.

In their motion for summary judgment, Plaintiffs assert that, if Count 3 is treated as moot, it would dissolve the January 7, 2014 preliminary injunction and “would bring S.B. 193 back to full life as of its effective date” and thus would result in “collateral consequences.” Reply 2, ECF No. 268.

Plaintiffs' argument is not well taken. Plaintiffs fail to provide evidence of the “collateral consequences.” They merely assert that Plaintiffs' “filings as a political party after [February 5, 2014] *could* be challenged by federal and state authorities (and perhaps others)” and donations made to LPO as a political party “might also be questioned.” Reply 2, ECF No. 268. Plaintiffs' claim is speculative, perfunctory, and unaccompanied by any argument as to the actual consequences that would stem from the Court's failure to declare that S.B. 193 cannot be applied retroactively. Therefore, the Court finds it waived. *See Cook v. Donahoe*, No. 3:11-cv-132, 2013 WL 93663, at *4 (S.D. Ohio Jan. 8, 2013) (“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.”) (citation omitted).

Plaintiffs have failed to articulate the need for a permanent injunction and declaration. Accordingly,

since the 2014 election cycle is now over, the Court **DISMISSES** Count 3 as moot.

C. Counts 4 and 5

Plaintiffs allege that S.B. 193 violates their rights under the First Amendment and the Equal Protection Clause of the United States Constitution (Count 4) and that it violates Article V, § 7 of the Ohio Constitution (Count 5). Count 4 is against Secretary Husted and Count 5 is against Secretary Husted and the State of Ohio. Plaintiffs move for summary judgment, and the State of Ohio has filed its cross motion for summary judgment on these counts. ECF Nos. 261 & 267.

1. Count 4

Plaintiffs attack the constitutionality of S.B. 193 as applied to them, claiming it places Plaintiffs at a political disadvantage relative to the two major parties in Ohio's general elections by denying LPO access to party membership privileges afforded to the two major parties and failing to provide LPO candidates an equal opportunity to gain access to Ohio's primary elections by affording the two major parties privileges not afforded to Plaintiffs.

This is not the first time the Court has addressed the constitutionality of S.B. 193. On March 16, 2015, the Court denied Intervenor Plaintiffs' motion for summary judgment in which they argued that S.B. 193 was unconstitutional on its face. ECF No. 285.

This Court found S.B. 193 was not *facially* invalid and thus granted the State of Ohio’s cross motion for summary judgment.¹ Order 2, ECF No. 285. Now before the Court is Plaintiffs’ challenge to the constitutionality of S.B. 193 *as applied* to them.

The Sixth Circuit Court of Appeals has explained the difference between facial and as applied challenges:

A facial challenge to a law’s constitutionality is an effort “to invalidate the law in each of its applications, to take the law off the books completely.” *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009) (en banc); *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (“a ‘facial’ challenge . . . means a claim that the law is ‘invalid in toto – and therefore incapable of any valid application.’” (quoting *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974))). In contrast to an as-applied challenge, which argues that a law is unconstitutional as enforced against the

¹ On February 27, 2015, Plaintiffs moved “to maintain the status quo,” ECF No. 284, and asked that Husted “not attempt to disqualify [LPO] from Ohio’s 2015 election ballot unless authorized by the Court through a final dispositive ruling.” Mot. 1-2, ECF No. 284. The Court issued a final dispositive ruling addressing the issues presented in Plaintiffs’ February 27, 2015 motion to maintain the status quo when it denied Intervening Plaintiffs’ Summary Judgment Motion, ECF No. 285, on March 16, 2015. For the reasons stated therein, Plaintiffs’ motion to maintain the status quo is **DENIED** as moot. *See* ECF No. 285.

plaintiffs before the court, a facial challenge “is not an attempt to invalidate the law in a discrete setting but an effort ‘to leave nothing standing[.]’” *Connection Distrib. Co.*, 557 F.3d at 335 (en banc) (quoting *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc)).

Speet v. Schuette, 726 F.3d 867, 871-72 (6th Cir. 2013). Thus, to prevail on their as-applied challenge, Plaintiffs must show how S.B. 193 is unconstitutional as enforced against LPO and its candidates.

Plaintiffs argue that S.B. 193 violates their First Amendment and Equal Protection rights under the United States Constitution by placing LPO at a political disadvantage. Pls’ Mot. Summ. J. 5, 6, ECF No. 261-1. Plaintiffs make the same arguments, some verbatim, as did Intervenor Plaintiffs when they moved for summary judgment on the statute’s facial validity. *See, e.g., id.* at 8 (“The ACLU correctly states that ‘S.B. 193 will then prevent . . . dissolved parties [including Plaintiff-LPO] from re-forming and fielding candidates until 2016, and because these candidates will be denied access to the 2016 Primary Election, voters will be barred from affiliating with these parties until at least 2017.’ Doc. No. 165-1 at PAGEID # 3279.”). In fact, the only new argument Plaintiffs make is an attempt to analogize a district court case out of Michigan to the application of S.B. 193 to LPO. *Id.* at 9-10 (discussing *Green Party of Michigan v. Land*, 541 [F.]Supp. 2d 912, 917-18 (E.D. Mich. 2008)).

Plaintiffs fail to cogently explain how their as-applied challenge to S.B. 193 differs from Intervening Plaintiffs' facial challenge. It is not the task of the Court to supply an argument or an evidentiary basis for Plaintiffs' bare allegations. Plaintiffs' amended complaint and motion for summary judgment fail to provide any specific evidence to support their as-applied claim. That is, Plaintiffs do not produce any evidence to demonstrate how the enforcement of S.B. 193 on *LPO and its candidates* is unconstitutional. *See Connection Distrib. Co.*, 557 F.3d at 336 (en banc).

Furthermore, Plaintiffs' assertion that *Land* supports its position that the application of S.B. 193 is unconstitutional is misplaced. *See* Pls' Mot. Summ. J. 10, ECF No. 261-1 (quoting language from *Land* in which that court found that "while at first blush the Statute may appear neutral on its face, further inquiry reveals that the Statute, by its own terms, benefits the major political parties to the detriment of all others." *Land*, 541 F. Supp. 2d at 917-18.). In *Land*, political parties, a newspaper and a political strategist successfully challenged the constitutionality of a Michigan law that allowed the two major political parties to obtain the party declarations of voters from the state's prior presidential primary. *Land* is inapplicable to Plaintiffs' as-applied challenge in two key respects. First, the central issue in *Land* was who is to receive the party preference information after the election has occurred. *Land*, 541 F. Supp. 2d at 920. *Land* concerns a law premised on the outcome of a single past election and relates to the reporting of information, whereas Plaintiffs now

ask the Court to make a determination on the prospective application of S.B. 193, which relates to the certification of minor political parties to Ohio's ballot. Second, *Land* specifically found the issue of a minor party's access to the ballot was not implicated, which is central to Plaintiffs' as-applied challenge. *See id.* 922-23.

Without more, Plaintiffs' as-applied challenge fails. Accordingly, the Court **DENIES** Plaintiffs' motion for summary judgment as to Count 4, ECF No. 261, and **GRANTS** the State of Ohio's motion as to Count 4. ECF No. 267. As addressed above, the Court finds Plaintiffs' motion to maintain the status quo moot.

2. Count 5

Plaintiffs seek a finding that S.B. 193 violates Article V, § 7 of Ohio's Constitution, which states in relevant part, "[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law. . . ." Ohio Const. art. V, § 7. In support, Plaintiffs claim that *Blackwell* interpreted this provision to require that "all political parties, including minor parties, nominate their candidates at primary elections." Pls' Mot. Summ. J. 10, ECF No. 261-1 (citing *Blackwell*, 462 F.3d at 582 (6th Cir. 2006)).

The State of Ohio argues Plaintiffs' claim is barred by sovereign immunity under the Eleventh Amendment to the United States Constitution. Mot. Summ. J.

11-14, ECF No. 267; *see also* Ds' Resp. to Pls' Second Mot. Prelim. Inj. 1-4, ECF No. 32.

Plaintiffs maintain that the State of Ohio waived any immunity that it had by voluntarily intervening in this case. *See* Compl. ¶ 351, ECF No. 188. Plaintiffs aver that Secretary Husted also lost his immunity as a result of that waiver.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "[I]n the absence of consent[,] a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89,101 (1984). Additionally, "[t]he Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest." *Id.* (internal citation and quotation marks omitted). "And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Id.* at 101-02; *see also id.* at 102 (discussing an exception carved out by *Ex Parte Young*, 209 U.S. 123 (1908), when a citizen of a state sues a state under the federal law seeking injunctive or declaratory relief).

Plaintiffs concede that "[h]ad the State of Ohio not voluntarily intervened as an additional Defendant,

Plaintiffs would have been barred by the Eleventh Amendment from prosecuting in this Court their Ohio constitutional claims.” Pls’ Mot. Summ. J. 12-13, ECF No. 261-1. Thus, the question is whether and to what extent the State’s intervention in this case resulted in a waiver of sovereign immunity.

“A State remains free to waive its Eleventh Amendment immunity.” *Lapides*, 535 U.S. at 618. “[T]he [Supreme] Court has made clear in general that ‘where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.” *Id.* (citing *Gunter v. Atl. Coast Line R. Co.*, 200 U.S. 273, 284 (1906)). “[O]ur test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.” *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (internal quotation marks omitted)). The Sixth Circuit has not so long ago stated the following:

In cases of consent, waiver cannot be implied but must be unequivocally expressed. Waiver occurs if the state voluntarily invokes federal jurisdiction, or else if the state makes a clear declaration that it intends to submit itself to federal jurisdiction. This is a high standard to meet, as courts will give effect to a state’s waiver of Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication

from the text as will leave no room for any other reasonable construction.

VIBO Corp., Inc., 669 F.3d at 691 (internal citation, alterations, and quotation marks omitted).

The State of Ohio argues that “[b]efore S.B. 193 was passed the State of Ohio intervened for the sole purpose of defending Plaintiffs’ challenge to Ohio’s out-of-state circulator law[, § 3503.06(C)(1)(a)]. . . .” State of Ohio’s Mot. Summ. J. 12, ECF No. 267. As such, the State of Ohio “did not, and could not, ‘unequivocally express,’ an intent to waive its immunity as to Plaintiffs’ Ohio Constitutional claim regarding a law that did not exist at the time it intervened.” *Id.* (citing *VIBO Corp., Inc. v. Conway*, 669 F.3d 675, 691 (6th Cir. 2012)). The State of Ohio claims that, since it did not have immunity under the Eleventh Amendment as to Plaintiffs’ challenge to S.B. 193 under the United States Constitution, pursuant to § 1983 (Count 4), it does not follow that, by defending those claims, it waived its immunity as to Count 5.

Plaintiffs’ argument appears to be as follows: Since the State of Ohio was not originally named as a defendant in the case, by intervening as to one argument, and then later, after Plaintiffs amended their complaint, joining in the defense against the newly added claims addressing S.B. 193, the State of Ohio waived any claim of immunity it may have made as to any of the claims addressing S.B. 193. *See* Pls’ Mot. Summ. J. 18, ECF No. 261-1. Thus, Plaintiffs argue the

State of Ohio waived its immunity “by such overwhelming implication from the text as will leave no room for any other reasonable construction.” *VIBO Corp., Inc.*, 669 F.3d at 691. The Court disagrees.

First, Plaintiffs’ reliance on *Lapides* is misplaced. See Pls’ Mot. Summ. J. 13-14, ECF No. 261-1. In *Lapides*, the United States Supreme Court held that, when a state removes a case from state court in which a citizen litigant has sued a state, the state’s removal constitutes a “form of voluntary invocation of a federal court’s jurisdiction sufficient to waive” this immunity. *Lapides*, 535 U.S. at 624 (“We conclude that the State’s action joining and removing of this case to federal court waived its Eleventh Amendment immunity. . . .”). This form of waiver did not occur here; rather, Plaintiffs instituted the instant action in federal court. See *Coll. Sav. Bank*, 527 U.S. at 676.

Further, there is no suggestion here that the State of Ohio expressly consented to being sued in federal court. The State of Ohio has clearly asserted its immunity in response to Plaintiffs’ arguments as to Count 5. See *Pennhurst State Sch. & Hosp.*, 465 U.S. at 121 (instructing courts to examine each claim in a case to see if the court’s jurisdiction over that claim is barred by the Eleventh Amendment).

After intervening, the Court considered the State of Ohio’s arguments in opposition to Plaintiffs’ first motion for preliminary injunction. The State of Ohio then responded to Plaintiffs’ second motion for a preliminary injunction, in which Plaintiffs sought

preliminary relief under Counts 3 through 5, expressly asserting its immunity to Count 5. Ds' Resp. to Pls' Second Mot. Prelim. Inj., ECF No. 32.

Plaintiffs' second motion seeking preliminary relief – Plaintiffs' first motion to address Count 5 – and the pending motion for summary judgment, are the only two motions filed relating to Count 5. In response to *both* motions, the State of Ohio has expressly asserted its immunity afforded to it by the Eleventh Amendment as to Count 5. *Cf. Ku v. State of Tennessee*, 322 F.3d 431, 432 (6th Cir. 2003) (denying the state sovereign immunity because the state failed to raise it before that court rendered a judgment on the merits).

Accordingly, the Court finds that the State of Ohio has not waived its immunity under the Eleventh Amendment of the United States Constitution as to Count 5. Therefore, the Court **GRANTS** the State of Ohio's motion for summary judgment on the basis of Eleventh Amendment immunity and **DISMISSES** Count 5 for lack of jurisdiction.

D. Counts 6 through 9

Plaintiffs assert four counts against both Secretary Husted and Felsoci (Counts 6 through 9). Specifically, Plaintiffs bring a facial and as-applied challenge to Ohio Rev. Code § 3501.38(E)(1) alleging First Amendment and Equal Protection Clause violations (Counts 6 and 7), a challenge to the “retroactive application of secretary's interpretation of” that law (Count 8), and a due process challenge claiming a

“constitutionally debilitating conflict of interests when [Professor Smith] adjudicated” the protest against Earl and Linnabary (Count 9).

Plaintiffs bring these claims pursuant to 42 U.S.C. § 1983, alleging violations of their rights under the First and Fourteenth Amendments to the United States Constitution. To prevail on a claim under § 1983, a plaintiff must show that a person acting under color of law deprived him of his rights secured by the United States Constitution or its laws. *Berger v. City of Mayfield Heights*, 265 F.3d 399, 405 (6th Cir. 2001).

Plaintiffs, Secretary Husted, and Felsoci move for summary judgment on these counts. ECF Nos. 205, 261, 264, 267.

Two preliminary matters to consider before addressing the substance of Plaintiffs’ claims are: whether Plaintiffs claims are bared [sic] by laches and whether Felsoci was a state actor when he filed his protest against Earl and Linnabary.

Secretary Husted asserts that laches bars Plaintiffs’ claims and moves for summary judgment on Counts 6 through 9 on that ground.

“Laches is the ‘negligent and unintentional failure to protect one’s rights.’ *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002) (quoting *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)). . . . Laches does not simply concern itself with the passage of time,

but rather focuses on the question of whether a delay renders it inequitable to permit the claims to be enforced. *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003). As such, a party asserting laches must show: (1) a lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting it. *Ford Motor Company*, 342 F.3d at 550; *Nartron Corp.*, 305 F.3d at 408.

McClafferty v. Portage Cnty. Bd. of Elections, 661 F. Supp. 2d 826, 839-40 (N.D. Ohio 2009).

The Court assessed Secretary Husted's claim of laches in the Court's Order denying Plaintiffs' fourth motion for a preliminary injunction and determined that Plaintiffs failed to advance their claims in a diligent manner and likewise failed to seek an earlier trial date. The Court also found compelling the evidence Secretary Husted presented that any change to the ballot at that point would create a substantial risk of voter confusion. The Court found laches applied to Plaintiffs' due process conflict of interest claim (Claim 9); but the remaining claims required extensive discovery. However, given the obstructive tactics employed by Felsoci's counsel during discovery, *see* Order 30-31, ECF No. 260, the Court did not bar any claim by laches. Given that Secretary Husted and Felsoci have not articulated any other basis for finding laches, the Court again declines to hold those claims barred by laches.

A second preliminary issue is whether Felsoci is a state actor under § 1983. There is ongoing discovery as

to some of the arguments related to this preliminary issue, but the Court need not make a determination as to whether Felsoci is a state actor with respect to Counts 6, 8, and 9 because regardless of whether he is, Plaintiffs' claims fail. However, as explained in greater detail below, the Court **DENIES WITHOUT PREJUDICE** Felsoci's motion for summary judgment as to Count 7 and **DENIES WITHOUT PREJUDICE** Plaintiffs' summary judgment motion on Count 7 based on the ongoing discovery regarding this as a ground for relief.

For purposes of the following analysis, the Court will consider Felsoci's arguments alongside Secretary Husted's arguments.

1. Count 6

Count 6 challenges the requirement in Ohio Revised Code § 3501.38(E)(1) that petition circulators disclose their employers. The Court addressed this specific issue in its March 19, 2014 Order denying LPO's third motion for a preliminary injunction. ECF No. 80. In that Order, the Court found that Plaintiffs failed to demonstrate a likelihood of success on the merits of their claim that Ohio Rev. Code § 3501.38(E)(1) violates the First Amendment. Plaintiffs appealed that Order to the United States Court of Appeals for the Sixth Circuit, which affirmed the Court's denial of Plaintiffs' third motion for a preliminary injunction and affirmed this Court's determination that Plaintiffs failed to show a likely favorable determination as to its

challenge to Ohio Revised Code § 3501.38(E)(1). *See* ECF No. 107.

Plaintiffs continue to maintain that the employer identification requirement of Ohio Revised Code § 3501.38(E)(1) is unconstitutional on its face because it impermissibly burdens their First Amendment right to engage in political speech. They contend the statute cannot survive the exacting scrutiny standard as that standard is applied to such disclosure requirements. *See* Pls' Mot. Summ. J. 19-20, ECF No. 261-1. That is, Plaintiffs argue the employer identification requirement in the Ohio statute chills political speech and is not substantially related to a significant state interest. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010).

Secretary Husted argues that "Plaintiffs' complete failure to present any evidence of 'chill,' the essential element of their facial First Amendment challenge, is fatal to their claim and 'renders all other facts immaterial.'" Mot. Summ. J. 18, ECF No. 267.

Felsoci argues that "instead of articulating a new evidentiary or legal basis for their motion, Plaintiffs simply rehash their prior unsuccessful arguments and incorporate by reference the evidence they previously submitted in their losing efforts." Felsoci's Supp. Mem. 1, ECF No. 265.

Secretary Husted and Felsoci both argue that Plaintiffs' facial challenge fails because the employer identification requirement places a minimal burden on Plaintiffs' First Amendment rights, and the

requirement serves Ohio's significant interest in detecting and deterring fraud in the signature gathering process.

The Court found that Ohio Revised Code § 3501.38(E)(1) does not offend any of the constitutional principles set forth in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), *Citizens in Charge v. Brunner*, 689 F. Supp. 2d 992 (S.D. Ohio 2010), or (*WIN*) *Washington Initiatives Now v. Rippie*, 213 F.3d 1132 (9th Cir. 2000). To the contrary, the Court found those decisions all recognize that a state may legitimately require disclosure of the identities of candidate petition circulators and their employers provided paid circulators are not singled out for such disclosure. *Buckley*, 525 U.S. at 198-88 (approving of a state statute that required disclosure of the identities of all circulators); *Citizens in Charge*, 689 F. Supp. 2d at 993 (assessing Ohio statutes that require disclosure of all sources of money spent on all candidates); *WIN*, 213 F.3d at 1139 (striking down a state law that required only paid circulators disclose their identities). In addition, the Court determined that all three decisions acknowledge a states' [sic] substantial interest in requiring disclosure of the identity of those who pay petition circulators. *Buckley*, 525 U.S. at 203 ("Through the disclosure requirements that remain in place, voters are informed of the source [of money]. . . ."); *Citizens in Charge*, 689 F. Supp. 2d at 993 (acknowledging that a state may legitimately require disclosure of the sources of money spent to support candidates); *WIN*, 213 F.3d at 1139 (recognizing

the state's "interest[] in combating fraud and providing voters with useful information about the electoral process."). The Court found that, here, the challenged statute goes no farther than requiring all paid circulators to disclose their identity and the identity of those that pay them.

Neither Plaintiffs nor Secretary Husted nor Felsoci have submitted any evidence to supplement that record. The Court's assessment remains the same.

Accordingly, the Court holds that Plaintiffs have failed to demonstrate a genuine issue of material fact that Ohio Revised Code § 3501.38(E)(1) is unconstitutional on its face. As a result, the Court **GRANTS** Secretary Husted's and Felsoci's motions for summary judgment and **DENIES** Plaintiffs' motion as to Count 6.

2. Count 7

In Count 7, LPO asserts an equal protection selective enforcement claim relating to the disqualification of the LPO candidates in the 2014 general election, which is commonly referred to as the "Felsoci debacle."

The Court most recently addressed this claim in its denial of Plaintiffs' fourth motion for a preliminary injunction on October 17, 2014, ECF No. 260. Removal of Earl, Clark, and Linnabary from the ballot was the first occasion on which enforcement of the employer disclosure requirement had resulted in the

disqualification of a statewide candidate. In the absence of a protest, Husted's practice had been to not check petitions to see whether the employer [sic] name and address had been admitted.

As the Court has been informed of ongoing discovery concerning the claims raised by Plaintiffs in Count 7, Plaintiffs', Secretary Husted's, and Felsoci's motions are hereby **DENIED WITHOUT PREJUDICE** to re-filing upon completion of discovery.

3. Count 8

In Count 8, LPO challenges Secretary Husted's retroactive application of Ohio Revised Code § 3501.38(E)(1), Comp. ¶ 369, ECF No. 188, through which Husted disqualified the LPO candidates from participating in the 2014 primary election. The Court initially denied a preliminary injunction under this theory on March 19, 2014, ECF No. 80, and denied Plaintiffs' motion seeking another preliminary injunction under this same theory on October 17, 2014, ECF No. 260. During its second review, the Court recounted the Court of Appeals' affirmation of the Court's March 19, 2014 Order, and the Court reviewed Plaintiffs' additional arguments.

As Plaintiffs fail to present any new evidence in support of Count 8, the Court **GRANTS** Secretary Husted's and Felsoci's motions for summary judgment as to Count 8 and **DENIES** Plaintiffs' motion for summary judgment as to Count 8.

4. Count 9

Count 9 claims a violation of due process due to Professor Smith's alleged conflict of interest. This claim was preliminarily addressed and rejected in the Court's October 17, 2014 Order denying Plaintiffs' fourth motion for a preliminary injunction, ECF No. 260.

Plaintiffs alleged that before the protest hearing, Professor Smith participated in writing a pro bono amicus brief for Attorney General DeWine that was filed with the United States Supreme Court in an unrelated matter. Plaintiffs argued that since Professor Smith worked for the incumbent Attorney General, Professor Smith was biased against Linnabary.

The Court determined that Plaintiffs' counsel was apparently aware of Professor Smith's participation in the other case, *see* Order 26-27, ECF No. 260, and that, in any event, Professor Smith filed the amicus brief before the protest hearing. Moreover, Professor Smith testified that he had no contact with Attorney General DeWine, and his participation in the other matter was limited to filing that single amicus brief.

Without any new showing by Plaintiffs of evidence to contravene the foregoing or new support for their position, the Court finds that Plaintiffs' claim fails as a matter of law. Accordingly, the Court **GRANTS** Secretary Husted's and Felsoci's motion for summary judgment as to Count 9 and **DENIES** Plaintiffs' motion for summary for summary [sic] judgment as to Count 9.

IV. CONCLUSION

For the foregoing reasons, the Court:

- **GRANTS** Plaintiffs' motion for summary judgment, ECF No. 261, as to Counts 1 and 2 and **PERMANENTLY ENJOINS** Secretary Husted and the State of Ohio from enforcing the residency requirement for circulators of petitions for candidates and initiatives set forth in of [sic] Ohio Revised Code § 3503.06(C)(1)(a);
- **DENIES WITH PREJUDICE** Plaintiffs' motion for summary judgment, ECF No. 261, as to Counts 4, 6, 8 and 9, and **DENIES WITHOUT PREJUDICE** their motion as to Count 7;
- **GRANTS** Secretary Husted's motions for summary judgment, ECF Nos. 205 and 267, as to Counts 4, 5, 6, 8, and 9, **DENIES WITH PREJUDICE** the same as to Counts 1 and 2, and **DENIES WITHOUT PREJUDICE** the same as to Count 7;
- **GRANTS** the State of Ohio's motion for summary judgment, ECF No. 267, as to Counts 4 and 5 and **DENIES WITH PREJUDICE** the same as to Counts 1 and 2;
- **GRANTS** Felsoci's motion for summary judgment, ECF No. 264, as to Counts 6, 8, and 9 and **DENIES WITHOUT PREJUDICE** the same as to Count 7;
- **DENIES** as moot Plaintiffs' motion to maintain the status quo until final disposition, ECF No. 284;
- **DISMISSES** Count 3 as moot; and

- **DISMISSES** Count 5 for lack of jurisdiction.

Finally, on October 12, 2015, Plaintiffs filed an omnibus motion to supplement the record, ECF No. 335, notwithstanding the Court's Order stating that the Court will establish a briefing schedule for the omnibus filings. *See* 0.1-2, ECF No. 305. The Court reviewed the authorities and determines they do not affect any of the Court's decisions in this Opinion and Order. Accordingly, Secretary Husted and Felsoci shall not include any discussion of these authorities in their forthcoming omnibus briefs except to the extent the parties rely on these authorities with regard to their arguments as to Count 7.

The response to Plaintiffs' omnibus motion is due **within fourteen days** of the date of this Order. The Court limits responsive briefing to a single brief for Secretary Husted and a single brief for Felsoci. The Court imposes a **twenty page limit** on all response briefs. Plaintiffs' [sic] are not permitted to file a reply without Order of Court.

The Clerk shall remove ECF Nos. 205, 261, 264, 267, and 284 from the Civil Justice Reform Act motions report.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON, JUDGE
UNITED STATES
DISTRICT COURT

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**Libertarian Party
of Ohio, *et al.*,**

Plaintiffs,

v.

**Jon A. Husted,
Ohio Secretary
of State,**

Defendant.

Case No. 2:13-cv-953

Judge Michael H. Watson

OPINION AND ORDER

(Filed May 20, 2016)

The Libertarian Party of Ohio (“LPO”) and several of its members, leadership, and/or candidates (“Plaintiffs”) move for summary judgment as to Count Seven of their third amended complaint, ECF No. 188. Mot., ECF No. 338. Ohio Secretary of State Jon A. Husted (“Secretary Husted”) and Gregory A. Felsoci (“Felsoci”) cross-move for summary judgment. ECF Nos. 344 & 345. The motions are ripe for review. Plaintiffs move to supplement the record. ECF No. 335. As that motion is unopposed,¹ the Court **GRANTS** Plaintiffs’ motion to

¹ Felsoci “objects” to supplemental exhibits five, six, eight, nine, ten, and twelve. Mot. 18, ECF No. 346. Felsoci’s objections to exhibits eight and nine are moot because Plaintiffs submitted those exhibits in support of motions that the Court has since ruled on. Felsoci objects to the admissibility of exhibits five, six, ten, and

supplement the record. ECF No. 335. For the following reasons, the Court **DENIES** Plaintiffs' motion, ECF No. 338, and **GRANTS** Secretary Husted's and Felsoci's motions, ECF Nos. 344 and 345.

I. FACTS

In 2014, LPO's candidates attempted but failed to obtain ballot recognition. Subsequently, LPO amended its complaint in this case to include, *inter alia*, Count Seven, arguing that Secretary Husted and Felsoci violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution when Secretary Husted selectively enforced Ohio Revised Code § 3501.38(E)(1) – which requires petition circulators to disclose their employer, resulting in the LPO candidates' removal from the 2014 primary ballot. Since that date, the Court twice reviewed this claim and twice found it unlikely to succeed. *See* Oct. 17, 2014 Order, ECF No. 260 & Mar. 19, 2014 Order, ECF No. 80.

The parties have incorporated by reference their previous briefing as to Count Seven, *see* Ps' Mot. 1, ECF No. 338; Sec. Husted's Mot. 16, ECF No. 344, and further claim that they have uncovered new evidence in support of their position. Their evidence consists primarily of the depositions of Matt Borges ("Borges"), chair of the Ohio Republican Party ("ORP"), Terry Casey ("Casey"), a political strategist who orchestrated

twelve on relevancy grounds. The Court considers those arguments in this Opinion and Order.

Felsoci's protest and is the current chairperson of the State of Ohio Personnel Board of Review, and Felsoci.² See ECF Nos. 335-2, 335-4, & 335-11. In addition, Plaintiffs submit evidence regarding the ORP's payment of \$300,000 to Zeiger, Tigges, Little & Lindsmith, LLP, ("the Zeiger law firm") in late 2014, early 2015, for its work representing Felsoci at the protest hearing and for other work it completed in the litigation of the instant suit. See Borges Dep. PAGEID ## 8603-05, 8610-12, 8630, ECF No. 335-11; Ps' Ex. 3, PAGEID ## 8496-501, ECF No. 335-3 (Zeiger law firm invoices and checks cut by the ORP).

Plaintiffs also submit, as "new evidence" the following additional e-mails and text message communications:

Between February 14 and February 21, 2014, Casey: (1) e-mailed members of Governor John Kasich's reelection campaign and the then political director of the ORP, David Luketic ("Luketic"), concluding with: "Plus, what is next!!" Ps' Ex. 3 PAGEID # 8438, ECF No. 335-3; (2) e-mailed members of Governor Kasich's campaign and Luketic with information regarding an initial assessment of what a protest of Plaintiffs' part-petitions would entail, *id.* at 8439-40, 8442 (stating "[c]learly we need to keep digging and digging on Oscar [Hachett]" (one of Plaintiffs' petition circulators)); (3) responded to an e-mail from Governor

² Felsoci also testified at the hearing held on September 29 and 30, 2014. His deposition testimony mirrors that of his testimony at the preliminary hearing, and neither that testimony nor his deposition substantiate Plaintiffs' claim.

Kasich's political director with the Governor's reelection campaign, Jeffery Polesovsky ("Polesovsky"), in which Polesovsky stated that "we can continue to work down the action item list" and indicated that he was forwarding "petition samples to our attorneys to help their research process," *id.* at 8441; (4) sent an e-mail to Polesovsky and Luketic seeking morning updates, *id.* at 8443; (5) received an e-mail from Luketic in which Luketic forwarded the result of a records request from Public Records/Corporations Counsel, Chris Shea of Secretary Husted's office, *id.* at 8444-45; (6) sent an e-mail to a leader of a "right for life" group and blind copied thirteen individuals, including members of Governor Kasich's gubernatorial office and his reelection campaign as well as Luketic with polling [sic] results about registered voters, *id.* at 8447-48 (commenting, "The Dems will be spinning big on the failure for this poll to account for the number of voters a Libertarian candidate will drain off."); (7) e-mailed Polesovsky and carbon copied Luketic stating, "Did push [TV Host Matt] Stainbrook earlier this morning for getting us a Libertarian potential client[.]" *id.* at 8449; (8) received e-mails from Luketic with an "Early Validity Report and "Lib. Petition Report" detailing the number of signatures collected by paid circulators, *id.* at 8450, 8460-70; (9) received an e-mail from Luketic with the subject line "Our Friends" of a forwarded e-mail from an attorney in Summit County that contained criminal history reports of LPO petition circulators, *id.* at 8451; (10) received an e-mail from Luketic with Felsoci's voting history, *id.* at 8459; (11) received an e-mail from Polesovsky with contact information for

Chris Klym, *id.* at 8471; Casey Dep. PAGEID # 8374, ECF No. 335-2 (stating that Chris Klym helped with the “logistics”); and (12) emailed his attorney Chris Klym’s [sic] e-mail address, Ps’ Ex. 3 PAGEID # 8472, ECF No. 335-3.

On February 26, 2014, Luketic texted Casey asking, “Would it help our case if one of the circulators signed [sic] a Democrat petitions this year.” *Id.* at 8473. That same day, Luketic e-mailed Casey an ORP member’s phone number who was going to help “on some logistics.” *Id.* at 8474; Casey Dep. PAGEID # 8377, ECF No. 335-2.

Between February 28 and March 1, 2014, Casey sent an e-mail to Jim Heath, host of the Ohio News Network, regarding the protest hearing. Ps’ Ex. 3 PAGEID # 8475, ECF No. 335-3. Casey also exchanged e-mails with Daniel Mead of the Zeiger law firm and Polesovsky, whom Casey stated typically e-mailed him upon request “whatever he happened to have around,” *id.* at 8476-78; Casey Dep. PAGEID # 8382, ECF No. 335-2.

On the day of the protest hearing, March 4, 2014, Casey sent several e-mails about the hearing and also addressed Borges’ comments regarding ORP’s involvement with the protest. Ps’ Ex. 3 PAGEID ## 8479-86, ECF No. 335-3; *see also* Ps’ Ex. 10 PAGEID # 8586, ECF No. 335-10. Casey e-mailed Chris Schrimpf (“Schrimpf”), the ORP communication director, about Borges’ comments, to which Schrimpf responded: “The Dems are just pushing the misspeaking part. ORP has not had involvement in the complaint to this point.

Let's talk more once the hearing is over." Ps' Ex. 10 PAGEID # 8584, ECF No. 335-10. Shortly after Borges apparently made a statement that insinuated that the ORP filed the protest, Borges then back-tracked and said that the ORP did not file the protest.

On March 7, 2014, Casey exchanged several e-mails about the results of the protest. *See* Ps' Ex. 3 PAGEID ## 8487-95, ECF No. 335-3. Between March 10, 2014 and May 6, 2014, Casey sent over twenty e-mails to a significant number of individuals, including Luketic, Polesovsky, Matthew Damschroder ("Damschroder"), currently, the Deputy Assistant Secretary of State and Director of Elections for Secretary Husted, and Borges, with updates regarding the litigation pending before this Court and related appeals. *See, e.g.*, Ps' Ex. 12, PAGEID # 8670, ECF No. 335-12 (blind copying over fifty people a news article from the *Columbus Dispatch* on May 1, 2014). On March 17, 2014, Borges sent an e-mail in response to Casey's "latest" regarding Plaintiffs' third amended complaint and Borges' potential testimony at the Court's hearing. *Id.* at 8640-41. In addition, on both March 16 and 19, 2014, Borges forwarded to Casey an e-mail from his attorney about the on-going litigation. *Id.* at 8647 (this e-mail was also sent to members of Governor Kasich's campaign and Luketic), 8685.

Based on this new evidence, Plaintiffs claim Secretary Husted and Felsoci violated their First and Fourteenth Amendment rights. Plaintiffs, Secretary Husted, and Felsoci move for summary judgment on those claims.

II. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265 (6th Cir. 2007).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing there is a genuine issue of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Pittman v. Cuyahoga Cnty. Dept. of Children and Family Serv.*, 640 F.3d 716, 723 (6th Cir. 2011). Summary judgment will not lie if the dispute about a material fact is genuine, “that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009).

Thus, the central issue is “‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Pittman*, 640 F.3d at 723 (quoting *Anderson*, 477 U.S. at 251-52).

III. ANALYSIS

A. Previous Court Rulings

The Court has already addressed Plaintiffs’ as-applied challenge to Ohio Revised Code § 3501.38(E)(1) twice. In one decision ruling on Plaintiffs’ motion for a preliminary injunction as to Count Seven, the Court found that Plaintiffs’ contention that the payor disclosure requirement chilled their First Amendment freedoms lacked merit. *See* Mar. 19, 2014 Order 22-24, ECF No. 80. The Court addressed Plaintiffs’ contention that Secretary Husted selectively enforced Ohio Revised Code § 3501.38(E)(1) when Plaintiffs moved for preliminary relief a second time. In an October 17, 2014 Order, the Court determined that given the deposition testimony of Secretary Husted, Plaintiffs failed to carry their burden of showing that Secretary Husted’s decision was influenced by political animus or controlled by Casey, members of Governor Kasich’s campaign, or any other source of improper political animus. Oct. 17, 2014 Order 16, ECF No. 260. Plaintiffs do not submit any new evidence or argument that contradicts these preliminary findings. Therefore, Plaintiffs’ selective enforcement claim based on Secretary Husted’s decision fails against both Secretary Husted

and Felsoci and the Court grants Secretary Husted's and Felsoci's motion for summary judgment on this ground.

In addition, in its October 17, 2014 Order, the Court addressed Plaintiffs' selective enforcement claim based on the filing of the protest and determined that the filing of the protest did not constitute a state action under § 1983 because it was filed by a private party. *Id.* at 21-22. As such, the Court found that Plaintiffs were unlikely to succeed on the merits of their selective enforcement claim because Felsoci's protest, even if it was filed on behalf of the ORP, did not constitute a state action because the protest process is for use by private citizens and is not a public function exclusively reserved to the state. *Id.* Plaintiffs now move for summary judgment, arguing that they have uncovered new evidence that the protest was part of a conspiracy.

B. Selective Enforcement

Plaintiffs bring their selective enforcement claim pursuant to § 1983, under which "a plaintiff must establish that a person acting under color of state law deprived the plaintiff of a right secured by the Constitution or laws of the United States." *Wilkerson v. Warner*, 545 F. App'x 413, 419 (6th Cir. 2013) (quoting *Waters v. City of Morristown*, 242 F.3d 353, 358-59 (6th Cir. 2001)). To successfully plead a selective enforcement claim, Plaintiffs must satisfy the following three elements:

First, [a state actor] must single out a person [or persons] belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the group which the defendant belongs to.

Stemler v. City of Florence, 126 F.3d 856, 873 (6th Cir. 1997) (citing *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1991)).

Plaintiffs' theory is that Casey, Felsoci, Damschroder, members of Governor Kasich's gubernatorial office and reelection campaign, and members of the ORP collectively conspired to violate Plaintiffs' First Amendment rights because Felsoci filed the protest of Plaintiffs' part-petitions. Accordingly, the Court construes Plaintiffs' argument to be that, since Plaintiffs' alleged "new" evidence demonstrates that there was a conspiracy between a private actor Felsoci, previously described by the Court as a hapless dupe for his utter lack of knowledge, intent, or conspiratorial objective, and state officials for purposes of § 1983.

A private party who conspires with state officials can be liable under § 1983. *See Jackim v. Sam's East, Inc.*, 378 F. App'x 556, 565 (6th Cir. 2010).

A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

Hooks v. Hooks, 771 F.2d 935, 943-44 (6th Cir. 1985).

On October 17, 2014, the Court preliminarily determined that Plaintiffs' claim of conspiracy to selectively enforce § 3501.38(E)(1) lacked merit. Since that date, the Court has allowed Plaintiffs every opportunity to obtain whatever evidence may be available to substantiate their claim. After reviewing that evidence and Plaintiffs' argument, the Court finds that Plaintiffs still fail to demonstrate that there was any unlawful action cognizable under § 1983.

As an initial matter, Plaintiffs have previously averred ORP [sic] involvement and now argue that the "new" evidence shows that the ORP "ratified" the filing of the protest. This argument is without merit as the Court has already determined that even if the protest was on behalf of the ORP, it did not constitute a state action under § 1983. *See* Oct. 17, 2014 Order 22, ECF No. 260.

a. Casey

Plaintiffs aver that Felsoci and the ORP conspired with Casey and that Casey is a state actor. Plaintiffs submit e-mails sent between Casey, Borges, and Schrimpf that show Casey worked with individuals active in county branches of the ORP. While these messages show Casey's proclivity to involve himself in Republican politics, the messages do not provide any support for Plaintiffs' claim of civil conspiracy between a private actor and a state actor.

Plaintiffs argue that Casey – a state actor – acted under color of state law when he orchestrated the protest because he is the chairperson of the State of Ohio Personnel Board of Review. However, Casey's government position does not make all of his actions "under color of state law." *Memphis, Tennessee Area Local, Am. Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898, 903 (6th Cir. 2004) ("It is the nature of the act performed, not the clothing of the actor or even the status of being on-duty, or off-duty, which determines whether the officer acted under color of law." (citation omitted)). "[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 (1988). Plaintiffs do not submit any evidence that indicates that Casey was acting in his official capacity, that Casey used his role as chairperson to facilitate his actions, or that Casey's position relates to any of the acts Plaintiffs cite. *See id.* ("[A]cting under color of state law requires that a defendant in a § 1983 action have exercised the power

‘possessed by virtue of state law and made possible only because the wrongdoer is clothed by the authority of state law.’” *West*, 487 U.S. at 48). In sum, Casey’s actions to facilitate the protest were those of a private citizen and do not in any way constitute actions committed under color of state law.

b. Matt Damschroder – Secretary Husted’s Director of Elections

Plaintiffs allege that Casey sought and obtained the assistance of Damschroder and claim that because of the e-mails sent by Casey on March 4, 2014, *see* Ps’ Ex. 3 PAGEID ## 8479, 8482-83, ECF No. 335-3, “it is finally clear that Damschroder was fully aware by March 4, 2014 of exactly what was going on. He knew all were involved and that Borges’s comment was considered to be a problem.” Ps’ Resp. 7, ECF No. 347.

In response, Secretary Husted argues that Plaintiffs fail to establish any joint action between Casey and Damschroder because the “‘new’ evidence” that Plaintiffs rely upon consisted of “a few additional emails . . . that are of the same nature” as the evidence previously submitted to the Court. Sec. Husted’s Mot. 14, ECF No. 344. Secretary Husted argues that the e-mails were “already in the public domain and were sent to many recipients” and that “[m]any were sent after the Secretary ruled on the protest.” *Id.* (emphasis omitted).

Plaintiffs rely upon two e-mails. The first is an e-mail sent by Casey at 1:02 PM on March 4, 2014, which

was the day of the protest hearing. Casey blind copied Damschroder, Polesovsky, and Luketic on that e-mail, which was a forwarded message from Schrimpf about Borges' comment disclaiming the ORP's involvement. The second is an email Casey forwarded to the same people containing an article from the *Plain Dealer* regarding the protest at 1:06 PM, also on March 4, 2014.

First, being blind copied on e-mails hardly equates to involvement in a conspiracy. *See Fisk v. Letterman*, 401 F. Supp. 2d 362, 377 (E.D.N.Y. 2010) ("Communications between a private and state actor, without more facts supporting a concerted effort or plan between the parties, are insufficient to make a private party a state actor.").

Second, Plaintiffs do not provide any evidence as to how these e-mails indicate that there was a plan or that Damschroder had committed, planned to commit, or asked someone else to commit an act to further that plan. If anything, the contents of the first e-mail would dispel any thoughts of the Plaintiffs' alleged "Borges Tie-in." Ps' Resp. 7, ECF No. 347. The Court is equally unconvinced that the e-mail sent four minutes later containing the *Plain Dealer* article does anything more than inform Damschroder about what he already knew.

Accordingly, the Court determines that these communications fail to show the existence of a civil conspiracy for purposes of § 1983.

c. Governor Kasich

Plaintiffs argue that there was a “connection” between Governor Kasich and the protest because the Zeiger law firm’s representation of Felsoci was arranged by Governor Kasich’s campaign. According to Plaintiff, since “[t]he Kasich Campaign, after all, knew ORP would pay,” Ps’ Mot. 2, ECF No. 338-1, Governor Kasich was involved in a conspiracy with Casey.

While Plaintiffs cite many communications between Casey and others, their assertion that Governor Kasich was somehow involved in the protest remains unsupported. The “new” communications indicate little more than what the Court has already found: Casey orchestrated the protests, coordinated legal representation with the same law firm that employs Casey’s personal attorney, found a LPO member who would have legal standing to protest the part-petitions, and e-mailed a lot of people in the process. *See, e.g.*, Ps’ Ex. 3, PAGEID ## 8439-40, 8442 (e-mails detailing the steps needed to protest the petitions); 8477-78 (e-mail in which Casey seeks information to provide Daniel Mead, attorney at the Zeiger law firm); 8471-72, 8474 (emails sent to Casey for purposes of contacting someone to reach out to potential protestors); 8459 (Casey received an e-mail with Felsoci’s voting history), ECF No. 335-3. *See also* Casey Dep. PAGEID # 8395, ECF No. 335-2 (Casey stated, “I send out lots and lots of e-mails to lots and lots of people.”). None of these communications provide any support for Plaintiffs’ proposition that Governor Kasich had knowledge of a plan or made any action in furtherance of that plan. While

the messages may have been sent to a few of Governor Kasich's gubernatorial office staff members, the messages have little, if any, significance without evidence of a plan or any actions taken by these individuals.

Plaintiffs argue that Governor Kasich's reelection campaign staff supported the protest and by way of their actions, Governor Kasich did so too. As support, they cite to e-mails that use words such as "we" and "our." *See* Ps' Mot. 3-4, ECF No. 338-1 (citing Ps' Ex. 3 PAGEID ## 8441, 8447, 8502, ECF No. 335-3). In all but a few of the instances, Casey authored the e-mail that used the words cited by Plaintiff. The only other remarks were by Polesovsky, a member of Governor Kasich's reelection campaign. Polesovsky's e-mails do not demonstrate joint action between *Casey and Governor Kasich* merely because a member of Governor Kasich's campaign staff sent messages to Casey.

Moreover, to the extent that a member of Governor Kasich's campaign staff was involved in the protest in his or her capacity as a staff member, that staff member is a private citizen working for a candidate, not for a state actor. *See Federer v. Gephardt*, 363 F.3d 754, 759 (8th Cir. 2004) (finding that member of the incumbent's staff "acted on behalf of [the incumbent] as a political candidate and a private person."). Therefore, any act committed by a member of the campaign staff – a private citizen – cannot qualify as under color of state law without the involvement of a state actor. To be clear, Plaintiffs fail to show any evidence that Governor Kasich had any knowledge of his campaign staff

members' actions. Further, Plaintiffs fail to show how these private citizens' actions constitute state actions.

In sum, the Court finds that Plaintiffs failed to show a civil conspiracy and that Plaintiffs therefore fail to demonstrate how the filing of the protest constitutes a [sic] state action under § 1983. In other words, Plaintiffs fail to identify any facts that are suggestive enough to back its allegations of a civil conspiracy, let alone able to withstand Secretary Husted's and Felsoci's motions for summary judgment. *See Nader v. McAuliffe*, 593 F. Supp. 2d 95, 103 (D.D.C. 2009) *aff'd* 2009 WL 4250615 (D.C. Cir. Oct. 30, 2009).

Because there is no conspiracy between Secretary Husted and Felsoci or any other state actor and Felsoci, Plaintiffs' selective enforcement claim against Felsoci and Secretary Husted fails and Secretary Husted and Felsoci are entitled to summary judgment on this ground.

Additionally, the Court reiterates that there is no evidence of selective enforcement here – i.e. there is no direct evidence of discriminatory intent or political animus on behalf of a state actor as part of any conspiracy or on the part of Secretary Husted. Furthermore, Secretary Husted and Felsoci point out two examples of when part-petitioners were successfully protested due to failure to completely or correctly fill out the employer box such that those part petitions were also found invalid, *see* Sept. 29, 2014 Pl Hearing Tr., PAGEID # 6605, ECF No. 247, Sec. Husted's Hearing Ex. E (Kristen Rine, elections counsel for Secretary

Husted's office, determining part-petitions violated the employer disclosure requirement in 2011 because the part-petitions omitted the employer's name and address); *In re Protest of Evans*, Nos. 06AP-539 through 06AP-548, 2006-Ohio-4690, 2006 WL 2590613, at *3-4 (Ohio Ct. App. 10th Dist. Sept. 11, 2006) (finding that the petition circulators did not correctly identify their employer between the two entities known to be involved in collecting signatures).

Accordingly, Secretary Husted and Felsoci are entitled to summary judgment on Count Seven of Plaintiffs' third amended complaint.

IV. CONCLUSION

The Court **GRANTS** Plaintiffs' motion to supplement the record. ECF No. 335. The Court **GRANTS** Secretary Husted's motion for summary judgment, ECF No. 344, and Felsoci's motion for summary judgment, ECF No. 345, and **DENIES** Plaintiffs' motion for summary judgment, ECF No. 338.

The Clerk shall enter final judgment in this case.

Accordingly, given Plaintiffs' appeal has been dismissed and a mandate has been issued, the Court **DENIES AS MOOT** Plaintiffs' motion to modify, ECF No. 339, and motion seeking a stay pending an appeal, ECF No. 352.

The Court notes that it has previously denied all motions for attorneys' fees and costs without prejudice to refile after entry of final judgment in this case and

that any refiled motion is referred to the Magistrate Judge.

IT IS SO ORDERED.

/s/ Michael H. Watson
MICHAEL H. WATSON,
JUDGE
UNITED STATES
DISTRICT COURT
